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CASES

DECIDED IN

THE HOUSE OF LORDS,

ON APPEAL

FROM THE COURTS OF SCOTLAND,

1828, 1829.

REPORTED BY

JAMES WILSON AND PATRICK SHAW, ESQUIRES,
ADVOCATES.

VOLUME III.

WILLIAM BLACKWOOD, EDINBURGH;
T. CADELL, AND M. STEVENS AND SONS, BELL-YARD,
LINCOLN'S INN, LONDON.

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CASES

DECIDED IN THE HOUSE OF LORDS,

ON APPEAL FROM THE

COURTS OF SCOTLAND,

1828.

Colonel GORDON of Cluny, Appellant.—*Wilson—Wright—Pyper.* No. 1.

JOHN ANDERSON, Respondent.—*Keay—T. H. Miller.*

Et e contra.

Tack—Clause.—A landlord having drawn up certain 'articles and conditions' for letting his estate, by which, inter alia, it was stipulated, that 'the whole fodder is 'to be used upon the ground, and none sold or carried away at any time, hay only 'excepted, and all the dung to be laid on the farm the last year of the lease;' and a tenant having taken a farm by a missive, binding himself to the conditions in another tenant's missive, which referred to these articles; and having also signed a draft of a tack referring to them—but the draft never having been extended, and he not having signed the articles themselves, but having possessed for the full endurance of the lease;—Held, 1. (affirming the judgment of the Court of Session), That the tenant was bound by the 'articles and conditions;' but, 2. (reversing the judgment), That, in conformity to the reversal in the case of Gordon against Robertson and others, 10th May 1826,* he was not entitled to carry away the fodder of the last year.

Feb. 15. 1828.

1ST DIVISION.
Lord Alloway.

COLONEL GORDON'S father, Mr Gordon, succeeded in 1800 to the estate and barony of Slains in Aberdeenshire. In 1801 the whole barony fell out of lease. Previous to reletting the farms, Mr Gordon, with the view of introducing a new system of cultivation and management, drew up a set of articles and conditions, to be communicated to intending offerers. The document was entitled, 'Articles and Conditions laid down by

* 2. Wilson and Shaw, (1826-27), p. 115.

Feb. 15. 1828. 'Mr Gordon for letting the estate of Slains,' and consisted of the following heads:—

'1. A twenty-one years' lease to be granted, and the tenant 'tied down to actual residence.

'2. Assignees and subtenants, legal or voluntary, without the 'proprietor's consent, to be excluded.

'3. The farms to be let, and marches lined out and fixed, 'agreeable to Mr Johnston's plan.

'4. Mr Alexander's estimate of the new rent is L.2382, of 'which 128 bolls bear, and 436 bolls meal, valued at 20s. per boll, 'and L.1818 in money. Mr Johnston's estimate is L.2633, of 'which 420 bolls in bear, and 720 bolls in meal, also valued 'at 20s. per boll, and L.1513 in money; the medium of which 'two estimates is 274 bolls of bear, and 587 bolls of meal, all of 'the growth of the estate, and L.1665 in money, making the gross 'of the medium rent, in victual and money, at said conversion, 'L.2517, exclusive of any immediate rise on the parts of Broadly-'hill, and Old Clochtow, and Nether Leask, at present under 'lease, and here put down only at their present rents; and ex-'clusive also of the fishings, not rented at all, and of the com-'mon moss, and 400 acres reserved by Mr Johnston's plan for 'plantations, and 100 acres more for roads, &c. which gross rent, 'under the exception of the fishings, and the farms under lease, 'and those now let by Mr Gordon himself, he makes the rule 'for the whole possessions yet to be let, keeping it in his option 'to take the victual in kind, or the above conversion of 20s. per 'boll; the bear and meal to be proportioned and laid upon the 'farms as best suits them, understanding each kind to be delivered 'of the accustomed weight and measure.

'5. Supposing the above rent is L. 2500, Mr Gordon agrees 'to allow L. 400 a-year of it for the first three years, to be given 'the tenants in lime, in proportion to their rents, retaining a due 'proportion for the three farms still under lease; Mr Gordon to 'purchase the lime, but the tenants to carry it, and furnish 'certificates of what they receive and use.

'6. Mr Gordon allows as much of the first year's rent as, 'when added to the present value of biggings belonging to him 'on each farm, will be equal to the said year's rent, for building 'suitable dwellings and offices, agreeable to the plan fixed by 'him, the dimensions to be larger or lesser in proportion to the 'rent and extent of the farm, and to be built within three years 'after entry, at the sight of his factor for the time, the tenants 'finding all the carriages, and recompensing the outgoing

'tenant, where he has any claim for meliorations. The dwelling- Feb. 15. 1822.
'house to be slated—the offices to be thatched or tiled, in the
'proprietor's option, and the whole to be kept in good condition
'during the lease, and left so at removal. But in case the tenant
'shall not have erected the said houses when the first year's
'rent becomes payable, he shall have only allowance out of his
'first year's rent to the amount of what he has built, without
'reckoning on carriages; and the balance, to the extent aforesaid,
'out of the next year's rent, if the houses are then completed.

'7. To encourage the tenants to make suitable enclosures, by
'making the outer fences stone-dikes, and the inner subdivi-
'sions ditch and hedge, lined out to the satisfaction of the factor
'for the time, they shall be allowed by the heritor, at the expiry
'of their lease, the value of such enclosures and fences, according
'as shall be valued by men mutually chosen, providing such en-
'closures are then fencible. But no allowance to be made for any
'enclosures that are not left fencible at the expiry of the lease;
'or if the proprietor incline to make any such enclosures or fences
'at his own expense, the tenant shall pay therefor yearly, along
'with his rent, at the rate of six per cent, and keep them in suffi-
'cient repair during the lease, and leave them so at his removal.

'8. The victual rent to be payable 'twixt Yule and Candlemas,
'and the money rent at Martinmas and Whitsunday each year,
'after reaping and ingathering the crop of that year, with interest
'thereafter during the not-payment,—the victual to be delivered
'at the granary, or at any other place to be fixed by Mr Gor-
'don, as most convenient to estate and market, and to be carried
'from thence to Peterhead, Aberdeen, or any place of the like
'distance, when required.

'9. The tenant to be allowed to give houses, yards, and por-
'tions of land, to such cottars only as are necessary for assisting
'in the culture of the farm; but under no lease, nor exceeding
'eight acres at most on the largest farm, and less in proportion
'on a less farm.

'10. The proprietor to pay cess and stipend, but the tenant to
'pay schoolmaster, ground-officer, moss-grieve, statute labour,
'and all other incidental or parochial burdens or assessments,
'imposed or to be imposed.

'11. The whole estate to be tied down to a general rotation of
'cropping; that is, to have always the one-third of the whole
'arable in green crop or summer fallow; never to plough the
'same field more than twice for a white crop, without an inter-
'vening green crop of turnip, potatoes, pease, beans, or red

Feb. 15. 1828. ‘ clover, or summer fallow; after which, barley or oats, with grass ‘ seeds; and never to mislabour, outlabour, or waste the posses- ‘ sion—this rotation to commence after the first three years: and ‘ the last three years of the lease, one-third of what is arable to ‘ be sown down with grass seeds, and to be only one year cut ‘ for hay, and two in pasture, otherwise to pay L.4 per acre of ‘ additional rent.

‘ 12. The mills of Brogan and Forvie being abolished as unne- ‘ cessary, the whole estate to be now thirled for what they grind ‘ to the mills of Collieston and Leask, paying the usual bannock ‘ and service, but no multure. The thirlage to each mill to be ‘ fixed by the proprietor by the time the leases are ready to be ‘ executed.

‘ 13. Every tenant or cottar to have privilege of firing for their ‘ own use from the common moss of the estate, and of marle, shell, ‘ or other common manure, but to be restricted and regulated as ‘ to their mode of working; and every tenant on whose ground ‘ such marle or manure is, shall be allowed surface damage, where ‘ the ground is in tillage, or has been improved; the said damage ‘ to be ascertained by men to be mutually chosen by the tenant ‘ on whose ground the marle or manure is, and the tenant taking ‘ away the same, and to be paid by the tenant taking away the ‘ same.

‘ 14. No tenant to sell pests, fuel, lime, marle, or other manure, ‘ nor ale or spirits, nor pull bent, nor plough or break up any ‘ sward or grass ground, near the sands; in particular, Whiteness, ‘ Little Collieston, Mudhole, Cothill, Haddo, Little Forvie, and ‘ Waterside, to be laid under said restriction as to the bents.

‘ 15. Power to be reserved to the proprietor to work and win ‘ marle, limestone, freestone, ironstone, and metals and minerals of ‘ every kind; make canals, sink pits, straight marches, exchange ‘ ground between farms, or with neighbouring proprietors, erect ‘ mills or other machinery, or make roads, or convey springs ‘ or drains in such direction as he shall think fit; and to make ‘ plantations, clumps, or belts, on paying surface damage, and ‘ making reasonable allowance for the ground to be taken away ‘ for such purposes.

‘ 16. The whole fodder to be used upon the ground, and none ‘ sold or carried away at any time, hay only excepted; and all ‘ the dung to be laid upon the farm the last year of the lease.

‘ 17. All to be tied down to answer the courts of the barony, ‘ and obey and fulfil its acts and regulations, and assist the ‘ officers in the execution of their duty.

'18. As also, a condition, as in all former leases, that if the 'tenant fail in payment of his tack-duty, or transgress or fail in 'the observance and performance of the other stipulations; then, 'and in any of these events, he or she shall be removable upon a 'single warning and decree of removing, in the same manner as 'if the tack had never been granted; and every tenant shall also 'be taken bound to remove without any warning or process of re- 'moving; and in case of disobeying or contravening any of the 'conditions or stipulations in the tack, he shall pay of additional 'rent at the rate of L. 4 per acre, over and above performance. Feb. 15. 1828.

'19. In setting Waterside and Little Forvie, and Mill-town 'of Forvie, power to be reserved to build piers, and make basins 'or harbours, and to reserve or take back, at a reasonable valua- 'tion, two acres of ground or thereby, to lie as a servitude, for 'the use of the tenants upon the estate, to lay down coal or 'other articles, or to build shades, granaries, &c.; and the same 'powers to be reserved at setting the Fish-town of Collieston.

'20. No blacksmiths or inn-keepers to have leases, or to be 'admitted without the consent of the proprietor.

'21. The entering tenant on the leases now to be granted 'shall be obliged to pay the removing tenant for labouring and 'planting the kail yards, and for the grass seeds sowed the year of 'removal, conform to appreciation of men to be mutually chosen.

'These are the articles and conditions referred to in the 'several offers made by us respectively, for different farms on the 'estate of Slains, of the dates hereto annexed to our respective 'subscriptions.'

The tenants, to the number of twenty-one, then subscribed the articles; but they were not subscribed either by Anderson or by George Wilkins; and then they proceeded in these terms:—

'The above are the general articles and conditions on which the 'leases on the estate of Slains are to be granted by me, and to be 'referred to therein, with the following explanation on article 'eighth, as to the meal; that the accustomed weight is, by the 'established usage of the barony, eight stone two pound each 'boll, deliverable at the mill-eye free of mixture: And as to the 'mode of cropping laid down by article eleventh, the proprietor 'agrees, for the accommodation of the tenants, that one-third of 'what shall, according to the foregoing rotation, come under 'tillage, shall be sown down with grass seeds, and to be only one 'year cut for hay, and two in pasture, otherwise to pay L. 4 'sterling per acre of additional rent. Declaring always, That if 'the tacksman shall find it also for his accommodation to continue

Feb. 15. 1828. 'those parts of the farm which have been laid down in grass, after 'the preparation before stipulated, in pasturage for any longer 'period than what is above condescended on, or shall find it 'his interest to enlarge that part of the arrangement of laying 'down to grass, it shall be optional to him to do so, notwithstand-'ing the proportional rotation before prescribed. In witness 'whereof, I have subscribed these presents, written by James Roy, 'my clerk, at Edinburgh the 5th day of May 1804, before these 'witnesses, Alexander Grant, Esq. writer to the signet, and the 'said James Roy. (Signed) CHA. GORDON.—Alex. Grant, 'witness; James Roy, witness.'

On the 23d of May 1801 George Wilkins made the following offer to Alexander Grant, writer to the signet, then Mr Gordon's agent:—'I hereby make offer to you, as agent for Mr Gordon of 'Cluny, proprietor of the estate of Slains, for a lease of twenty-'one years of the farm of Milltown of Brogan, according to the 'new proposed boundaries, viz. running from the mill of Col-'lieston, in a straight line, to the loch at Andrew Sharp's, then 'by the mill-road, in the line of march at the east side of the 'Weaver's Croft, down by the south dike of Middle Brogan, 'with a straight to the march of mill of Leisk, the yearly rent of 'L.107. 16s. sterling money, and 26 bolls of meal and 15 bolls 'of bear, good and sufficient of their kind, payable the money 'rent at Martinmas and Whitsunday, by equal portions; and 'the victual rent deliverable, at Yule and Candlemas, at the 'granary, or Peterhead, or the like distance as formerly; my 'possession to commence as at the present Whitsunday 1801 for 'crop 1802. In case my description of the boundaries may not 'be accurate, I understand it to be as delineated on Mr Johnston's 'new plan; and that I am to be allowed a year's rent to enable 'me to build a dwelling-house and set of offices suitable to the 'general plan of the estate; I to furnish the carriages, and to 'maintain said dwelling-house and offices in good condition, 'and leave them so at my removal. The dwelling-house to be 'slated, the offices to be thatched or tiled, as most agreeable to 'the proprietor; and I engage to have the steading completed by 'the time that the last half of my first year's rent becomes due, 'namely, Whitsunday 1803. I understand I am to have my 'share of the proprietor's general allowance of lime for the first 'three years, and that I am to be allowed, at the expiry of the 'lease, the value of such enclosures by stone-dikes as I may erect 'on the farm at the sight of the factor for the time being; the dikes 'to be estimated by mutual appreciators; and that I shall be

'allowed to give houses and yards, and a small portion of land, Feb. 15. 1828.
'to such cottars as are necessary to assist me in the culture of
'the farm, not exceeding in the whole eight acres, but over
'which I am to give no lease. I agree to the seclusion of assig-
'nees and subtenants, and to actual residence by me and mine
'upon the farm, and to a general rotation of cropping, and any
'other regulations to be laid down for the whole estate. I agree
'to pay schoolmaster, ground-officer, moss-grieve, and statute
'labour, as formerly; but I understand that I am to be liable in
'no cess or stipend, never having paid it before; and to be
'allowed firing for myself and cottars from the common moss of
'the estate, and to submit to the rules of the barony in all other
'respects. I expect I am to be allowed the materials of the pre-
'sent steading of offices, without paying any consideration there-
'for. Lastly, I engage to enter into a lease on the foregoing
'terms, the lease to contain all the regulations intended to be laid
'down for the estate, if by that time digested and ready; and I
'understand the mill of Brogan to be abolished, and not con-
'tained in my offer. In testimony whereof, I subscribe and
'address this offer to you before these witnesses, Walter Finlay
'and Andrew Robertson, both writers in Edinburgh.'

Mr Gordon, to whom this offer had been transmitted, wrote of the same date to Wilkins:—'I agree to the terms therein 'expressed, understanding every thirlage following the mill of 'Brogan to be abolished, in consequence of the new arrangement 'of the estate, and the privilege of moss to be regulated also 'by that arrangement.'

Thereafter John Anderson, on 28th May 1801, addressed to Mr Grant, writer to the signet, Mr Gordon's agent, the following missive:—

'Notes of offer by John Anderson to Mr Gordon.

'1. A lease of Kirkton as possessed by him, with part of the 'lands of Crawley and Muckletown, as delineated on the plan, 'for 21 years from this Whitsunday and Martinmas next.

'2. Money rent L.200, and 100 bolls barley.

'3. L.200 to be allowed on repairing the steading.

'4. The proportion of lime to be allowed with the other 'tenants.

'5. The neighbouring tenants to make and uphold the half of 'the march fences.

'6. The landlord to pay cess and stipend, and the tenant to 'pay schoolmaster's fees, baron-officer, and moss-grieve's dues.

'7. The tenant to be allowed to subset the lands of Crawley

Feb. 15. 1828. 'and Muckletown, or part of them; or to find a tenant to the 'proprietor's satisfaction.

'8. The proprietor to advance a sum of money for enclosing, 'by a stone-dike, part of Seafield farm, as delineated on the plan 'by Mr Johnston, for which the tenant is to pay six per cent in 'addition to the above offer.

'9. The tenant to be bound to the conditions of Mr Wilkins' 'offer, and to be thirled to the mill of Leask for such corns of 'the farm as he shall have to grind; understanding that I am to 'pay no multure to the proprietor, but to pay the miller for 'workmanship, which is called bannock and half. The fore-'going is my highest offer.'

On the 2d of June following, Mr Gordon answered by letter,—

'I have received and considered your offer to Mr Grant, of '28th May, for Kirkton and Seafield, according to the new 'arrangement, as delineated on Mr Johnston's plan, of which 'offer the prefixed is an exact copy; and I accept thereof on the 'footing of Mr Wilkins' offer, and the general conditions laid 'down by me for the whole estate; and at your request, and to 'oblige you, I further agree to accept of your victual, 60 bolls 'in bear, and 40 bolls in meal, and to enclose your part of the 'Crawley and Muckletown, if you require it—you paying at the 'rate of six per cent along with your rent for the expense of 'said enclosure, and keeping it fencible and in good condition 'during the lease, and leaving it so at your removal, and leaving 'that farm in three years' grass, and Seafield the same, and on 'same terms if enclosed by me; your removal from each, in 'that event, to be at Martinmas instead of Whitsunday: and if 'you find me a good tenant for the farm of Crawley, enclosed 'or unenclosed, I shall either accept of him and relieve you in 'so far, or allow you to subset it to him yourself, understanding 'that he is to have a proportion of my allowances for building, 'and for lime, &c., and to be liable to all the other conditions 'imposed on the other tenants. A lease to be prepared and 'executed as soon as the other leases of the estate can be got 'ready.'

Anderson had been already, under the old lease, in possession of the farm, and now continued it.

Afterwards, a draft tack between Mr Gordon and the tenants of Slains was drawn in the following terms:—'It is contract-'ed, agreed, and ended, betwixt Charles Gordon of Cluny, 'Esq. heritable proprietor of the estate of Slains, of which the 'lands and others after-mentioned are a part, of the one part,

'and of the other part, in manner and to the Feb. 15. 1828.
'effect following:—That is to say, the said Charles Gordon, in
'consideration of the yearly tack-duty of money and victual
'underwritten, and of the other prestations, conditions, stipula-
'tions, and reservations specified and contained in a separate
'paper of general articles, subscribed by him as relative to his
'leases of said estate, and to be held as part of these presents,
'hath set, and in tack and lease let, as he hereby sets, and in
'tack and assedation lets, to the said and
'his heirs, secluding assignees and subtenants, legal or voluntary,
'without the express consent of the proprietor, all and whole
' lying in the parish of Slains, and
'county of Aberdeen, as the same have been marched and
'bounded according to a new arrangement and plan of said
'estate, made by Thomas Johnston, land-surveyor, subscribed
'by the said Charles Gordon, and already subscribed, or to
'be subscribed, by the said
'with which contents and boundaries he holds himself satisfied,
'and that for the space of 21 years and crops from and after
'the term of Whitsunday 1801, which is hereby declared to
'have been the commencement of this tack, and the term of
'the said his entry: which tack,
'with and under the several prestations, conditions, stipulations,
'and reservations, before and after specified, and in the articles
'referred to, the said Charles Gordon binds and obliges him-
'self, his heirs and successors, to warrant at all hands: For the
'which causes, and on the other part, the said
'binds and obliges himself, his heirs and successors, not only to
'adhere to, obey and perform, the whole articles, conditions,
'stipulations, and others, contained in the general articles re-
'garding said estate, herein [before] referred to, and held as part
'of these presents, but also to pay to the said Charles Gordon,
'his heirs or assignees, or to any factor to be appointed by him
'or them, for the years of the present lease yet to run, the money
'and victual tack-duties underwritten; viz. the sum of
'sterling of money rent each year, by equal portions, at two
'terms, the first Martinmas and Whitsunday after the separation
'of each year's crop from the ground, beginning the first half-
'year's payment at Martinmas 1804, for that year's crop, and
'the next term's payment for said crop at Whitsunday 1805,
'and so furth yearly and termly thereafter, during the currency
'of this tack, with a fifth part more of each term's payment of
'liquidate penalty in case of failure, and the legal annualrent

Feb. 15. 1828. ‘of the said termly payments from the time that the same be-
‘come due during the not-payment; as also to pay and deliver
‘to the said Charles Gordon, Esq. or his foresaids, the number
‘and quantity of bolls of bear, and
‘bolls of oatmeal, good and sufficient victual; the meal to be of
‘the accustomed weight of the barony, being eight stone and two
‘pound weight each boll, and the bear of the accustomed mea-
‘sure of the best of the growth of the farm, seed only excepted,
‘and to be dressed and cleaned to the satisfaction [of the person
‘receiving the same];* the meal to be delivered from the mill-eye
‘free of mixture, between Yule and Candlemas each year, and
‘the bear [also] each year, betwixt [Yule and] Candlemas, and
‘that at the granaries of the said Charles Gordon upon the
‘estate of Slains, or at any other place on said estate to be fixed
‘by him, and from thence, and at his the tenant's own expense,
‘to transport the same, at any time required, to Newburgh, Peter-
‘head, Aberdeen, or any other place or port of the like distance:
‘And the said further obliges himself and his
‘foresaids, at the expiry of this tack, to flit and remove them-
‘selves, and their families, servants, cottars, and dependants, and
‘whole goods, stocking and effects of every kind, from the pre-
‘mises, and to leave the same void and redd, without any warn-
‘ing or process at law to that effect; wherein if he fail, he shall
‘be liable in triple the said yearly rent, for each year he con-
‘tinues thereafter: And both parties oblige themselves and their
‘foresaids to implement and perform their respective parts of
‘the premises, and of [said] separate articles to each other, under
‘the penalty of L.100 sterling, to be paid by the party failing
‘to the party performing, or willing to perform, over and above
‘performance; and consent to the registration hereof, *and of the*
‘*said separate articles, as part, in the books of Council and Ses-*
‘*sion, Sheriff Court books of Aberdeen, or others competent,*’† &c.

‘N. B.—*The clause of subscription should bear, that, of the date*
‘*of the tenant's subscribing, he has got printed copy of the separate*
‘*articles, and the articles should be recorded as a probative writ,*
‘*and the tack bear the date of registration.*’

Written on the back thus:—

‘The seven preceding pages is the draft of the tack which we
‘agree to enter into for our respective farms on the estate of
‘Slains, with this exception, that such of us as have separate

* The words circumflexed were interlined.

† The words in italics were in a different handwriting from the rest of the draft.

'writings from the proprietor, for giving us further allowance 'for buildings than specified in the general articles, the terms of 'such separate writings are to be engrossed in our tacks.— 'Slains, 12th May 1804.' Feb. 15. 1828.

The document was then subscribed by 21 tenants, including Wilkins, but not Anderson. He, however, afterwards did so, under this qualification:—

'Mr Anderson agrees to the above, with this difference only, 'that his tack was a Martinmas entry. (Signed) JOHN ANDER-'SON.—Aberdeen, Aug. 30. 1806.'

The draft was never extended, or formally executed.

Anderson remained in possession of his farm until the termination of the stipulated endurance; and Colonel Gordon, understanding that he contemplated carrying off the whole straw of the waygoing crop when he removed, presented an application to the Sheriff of Aberdeenshire, praying him to ordain Anderson and his subtenants 'to use the fodder of the present crop 'upon the farm of Kirkton and others foresaid, and in the mean 'time to prohibit and discharge them, and each of them, from 'carrying off any part of the fodder of said farms, hay excepted, 'until parties are heard and this action decided.' The Sheriff granted interim interdict, which, however, he afterwards recalled, and allowed the tenant to appropriate and remove the fodder in question. Colonel Gordon advocated, and the Lord Ordinary, 'in respect of the decision of the House of Lords in the case of 'the Duke of Roxburghe against Robertson, 17th July 1820,' ordered Informations to the Court; and his Lordship added in a note,—'In a case of this nature, where the practice which has 'so long subsisted in Scotland is said to be totally subverted by 'a judgment of the Court of Review, it is necessary that both 'landlords and tenants should be speedily acquainted with the 'construction to be put upon such clauses as are now in question, 'and that some measures should be adopted to protect the rights 'of the tenants, as, if they shall be compelled to consume the 'fodder of their last crop upon the ground, the landlord must 'surely be compelled to find the means of doing so, as it fre-'quently happens, even in more southern parts of Scotland than 'where the barony in question lies, that it is difficult to get the 'grain into the barn-yard before the term of removal at Martin-'mas. If, therefore, a new practice be introduced, as to the 'consumption of the fodder of the outgoing crop, it may be a 'matter of the most serious importance for the country and for 'the Courts, whether some new construction of the clause, as to

Feb. 15. 1828. 'the tenant's removal, may not be devised, so as to allow them 'to continue in possession until Whitsunday, by which time the 'fodder might be consumed; and it is supposed that the land-'lord must then pay them for the value of the dung formed of 'that fodder, otherwise he would have a very considerable part 'of last year's crop of every tenant removable at Martinmas, as 'the tenant could not, by that term, have the means, either of 'thrashing out the corn, or consuming the fodder, which, at the 'time the contract of lease was entered into, could not have been 'in the contemplation of either landlord or tenant.' At this time Colonel Gordon had not produced any evidence of Anderson having subscribed the regulations, and the Court, on the 8th of July 1823, found, 'that the regulations referred to not 'having been signed by the tenant, or even adjusted at the date 'of the missives of lease in question, the general reference made 'thereto, as in the offer of Wilkins, is insufficient to render the 'said regulations effectual and binding on the defendants in 'this case, to the effect of obliging them to consume on the farm 'the fodder of the last or waygoing crop, as contended for by 'the pursuer;' and therefore remitted simpliciter.

Colonel Gordon petitioned, and produced the draft of the lease, signed by Anderson; and the Court, on the 28th November 1823, 'upon the petitioner making payment to the respon-'dent of the whole previous expenses,' appointed the petition to be seen and answered.

In the meanwhile, the same question of construction of the clause in the regulations had been under discussion before Lord Cringletie, with a tenant named Robertson. His Lordship had, in respect of the judgment of the House of Lords in the case of the Duke of Roxburghe against Robertson, remitted to the Sheriff to recall his interlocutor allowing the tenant to appropriate and remove the fodder; but the Court required the opinions of the other Judges upon the legal construction of the clause; and their Lordships being unanimously (with the exception of Lord Cringletie) of opinion, that the tenant was, under that clause, entitled to dispose or carry off the straw of the waygoing crop, a judgment was pronounced to that effect;* and on advising Anderson's case, the Court, on the 10th March and 17th May 1825, recalled their interlocutor, and found, 'that the 16th 'article of the general articles of lease regarding the estate of 'Cluny, cannot be held as applying to the crop of the last year

* See 3. Shaw and Dunlop, No. 440.

'of the lease; and that the rights of the parties respecting the 'same must be regulated by the common law and usage of the 'country;' and remitted simpliciter, with full expenses, for which they decerned on the 25th of June.* Feb. 15. 1828.

Colonel Gordon appealed, and the judgment in the House of Lords in Robertson's case having been reversed,† Anderson cross appealed on the specialties in his own case.

Appellant in principal appeal, (*Colonel Gordon*).—The general point as to the construction of the clause in question has been decided, and the respondents do not dispute that the judgment of the Court must be reversed.

Respondent in principal appeal, (*Anderson*).—The general point must certainly be ruled by the decision in the case of Robertson.

Appellant in cross appeal, (*Anderson*).—Independent of the question of construction, the inquiry remains under the cross appeal, Whether the respondent ever put himself under the operation of this clause? It is hard and rigorous in its essence, and contrary to practice. Slight evidence will not yield the presumption that the tenant exposed himself to it. This is not a matter of regulation, which a tenant may be supposed to have assumed by a general reference, but a condition which a tenant would not have accepted had it been distinctly brought before him. It is conceded, that possession will cure informality; and, therefore, Anderson having entered on the missive, the contract was binding. Now, had the question occurred in 1802, would he have been bound by the clause? The reference to Wilkins' lease is general; and that of Wilkins is not more particular. At that time, it does not appear that the regulations were in existence; at any rate, they were not signed by either Anderson or Wilkins. The only other evidence relied on by Colonel Gordon is merely a draft of a lease full of blanks and interlineations, and improbative. Not only that could have been healed by possession, but the tenant did not possess on the lease, but on the missive on which he had already entered. Neither was there any rei interventus to bar the tenant from resetting.

Lord Chancellor.—You are assuming in your argument that this was an entirely new contract.

Keay.—We maintain that the tenant could not have been

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* See 4. Shaw and Dunlop, No. 12.

† 2. Wilson and Shaw's Appeal Cases, (1826-7), p. 115.

Feb. 15. 1828. obliged to have acceded to this clause. To make him liable, it was necessary to have a new contract. But the document containing the new contract not being probative, and no possession having followed on it, the contract is not obligatory.

Lord Chancellor.—Certain regulations are referred to. Where are they if these be not them?

Keay.—We admit that we would be bound by mere regulations. But this is not a regulation or a clause which a tenant could have contemplated.

Lord Chancellor.—It appears to me to be a regulation, and one advantageous to the property. Some regulations were clearly intended, and we see a paper signed by a number of tenants, all of whom must have regarded this clause as a regulation; and the appellant himself signs the draft lease adopting the regulations; and he hardly would have signed, if he had not known generally what the regulations referred to were; nor can he now protect himself by saying, he did not know what were the regulations he had thus deliberately adopted. The draft lease was not a new, but part of an old contract.

Miller.—We contend, that although the tenant referred to certain regulations, he did not refer to this unusual clause, which did not relate to a mere matter of regulation. The tenant not having signed the regulations, did not assume the obligation in the clause in question; and the draft lease being improbative, and not followed by possession, did not bind the tenant. Besides, the system laid down by Colonel Gordon was so preposterous, that with his full knowledge it was departed from by all the tenants on the estate. It is quite clear that the interlocutor finding Colonel Gordon liable for the expenses up to the date of his petition with which he produced the draft lease, must stand. It was his duty to have originally come forward with the strength of the case; and the draft lease was, or must be held to have been, in his possession.

Respondent in cross appeal, (Colonel Gordon).—The obligation to grant a lease is identical with granting a lease; and Anderson's notes and missive being followed by possession, became binding. In it, he referred to the conditions of Wilkins' offer; and Wilkins refers to regulations. It is not pretended that there are any other regulations than those in question; and it cannot be believed that any of these tenants would refer to what they were, as Anderson pretends he was, utterly ignorant of. Colonel Gordon's acceptance is quite conclusive.

Lord Chancellor.—Colonel Gordon distinctly describes the conditions as 'laid down,' not merely as regulations to be afterwards framed. Feb. 15. 1828.

Wilson.—Then we have the draft lease signed by Anderson and Wilkins—the former adding a condition to his signature, proving he had carefully weighed the regulations. This draft has been possessed on since 1804. It distinctly refers to the regulations as pars contractus, and as already in existence. It is quibbling to say, that the possession cannot be ascribed to the lease, but to the missive. The possession was continuous, and applicable to both. In truth, the tenant had been in the farm under his old lease, and never ceded possession to re-enter on the missive. The argument, that, in consequence of the system being irrational, Anderson departed from it, shews that he knew what were the regulations. But there is no ground for such a statement; and if the tenants departed from the system contained in these regulations, they did so in breach of their covenant, and in the ignorance of the landlord. There is nothing rigorous in the clause itself. Indeed, it is introduced into the leases of the richest agricultural districts of Scotland, and where the best farming prevails. The previous expenses ought not to have been laid on Colonel Gordon. The tenant must have known of the existence of the draft, and ought not to have argued his case on the assumption that none such had ever been drawn. In point of fact, the draft was in the hands of a person who formerly had been agent for Colonel Gordon, and who only accidentally recovered it after the Court had pronounced their judgment of the 8th July 1823.

The House of Lords ordered and adjudged, 'That the said 'several interlocutors of the Sheriff-substitute and Sheriff-depute 'of Aberdeenshire, also the several interlocutors of the Court of 'Session of the 8th July and 18th December 1823, and the 17th of 'May and 25th June 1825, complained of in the said original 'appeal, be, and the same are hereby reversed. And it is farther 'ordered and adjudged, that the said interlocutor of the Court of 'Session of the 28th November 1823 be, and the same is hereby 'affirmed. And it is farther ordered and adjudged, that the said 'interlocutor of the Court of Session of the 10th March 1825, 'also complained of in the said appeal, be, and the same is here-'by reversed, except so far as the same recalls the previous 'interlocutor of the Court of Session of the 8th July 1823. 'And it is farther ordered and adjudged, that the cross appeal 'be, and the same is hereby dismissed by this House, and that

Feb. 15. 1828. 'the said interlocutors therein complained of be, and the same are 'hereby affirmed. And it is farther ordered, that the said cause 'be remitted back to the Court of Session, to proceed therein in 'such manner as is consistent with this judgment.'

LORD CHANCELLOR.—My Lords, There is case which was argued on a former day at your Lordships' Bar, of Anderson against Gordon, in which there was an appeal, or indeed appeals, from the Courts of Scotland. One of the appeals related to the construction of a particular clause in a lease, or rather a clause contained in certain articles and conditions referred to and adopted in a lease. The clause was in these terms:—'The whole fodder to be used upon the ground, and 'none sold or carried away at any time, hay only excepted; and all 'the dung to be laid upon the farm the last year of the lease.' The question that was intended to be argued, related to the interpretation of that clause. It was contended on the part of the tenant, that it did not refer to the last year of the lease. When the case was called on at the Bar, the Counsel very properly abandoned that part of the case; and they abandoned it, on the ground that the very point had been previously decided by this House; and therefore it is unnecessary that I should trouble your Lordships by making any farther observations upon that part of the case. It is admitted that the judgment of the Court below, in that respect, must be reversed.

But another question arose, and a material and important question for consideration, which was this, Whether the clause in question was binding on the tenant Mr Anderson? It was contended, that it was not binding on the tenant Mr Anderson; that he had not subscribed it; and that he had never seen it when the lease was granted, and when he had taken possession of the farm. It is necessary, therefore, that I should call your Lordships' attention to the documents. It appears that Mr Gordon was the proprietor of an estate of the name of Slains, which was divided into several parts; and that in the year 1801 he was about to relet to different tenants the whole of this property. Among the persons who appear to be allowed to take a farm, was a person of the name of George Wilkins. George Wilkins, it appears, wrote a letter, dated the 23d May 1801, in these terms:—'I agree to the seclu-'sion of assignees and subtenants, and to actual residence by me and 'mine upon the farm; and to a general rotation of cropping, and any 'other regulation to be laid down for the whole estate;'—that was, the whole estate of Slains, which was to be taken by a number of tenants. Lastly, he said, 'I engage to enter into a lease in the fore-'going terms. The lease to contain all the regulations intended to be 'laid down for the estate, if by that time digested and ready.' So that if the regulations which were proposed were digested and ready, —I mean those regulations which were to apply to the whole estate of Slains,—those regulations were to be contained in the lease.

Mr Anderson, who is one of the parties to this appeal, a few days after the letter to which I have referred, entered into this agreement, or made this proposal:—'Notes of offer by John Anderson to Mr Gor-'don. A lease of Kirkton as possessed by him, with part of the lands 'of Crawleys and Muckletown, as delineated on the plan, for 21 years 'from this Whitsunday and Martinmas next;' and then the offer being divided into distinct heads, the ninth is in these terms:—'The tenant 'to be bound to the conditions of Mr Wilkins' offer,'—that is the Mr Wilkins to whose letter I before referred your Lordships,—'and to be 'thirled to the mill of Leask for such corns of the farm as I have occa-'sion to grind; understanding that I am to pay no multure to the 'proprietor, but to pay the miller for workmanship, which is called 'bannock and half.' This letter is dated 28th May 1801; and in four days afterwards, namely, on the 2d June 1801, Mr Gordon writes as follows, addressed to Mr John Anderson in Kirkton of Slains:—'Sir, '—I have received and considered your offer to Mr Grant, of 28th 'May, for Kirkton and Seafield, according to the new arrangement as 'delineated on Mr Johnston's plan, of which offer the prefixed is an 'exact copy, and I accept thereof on the footing of Mr Wilkins' offer, 'and the general conditions laid down by me for the whole estate.' So that he refers distinctly to the proposition made by Mr Wilkins, which had been accepted by Mr Gordon, and which was to include the general conditions laid down for the whole estate. Feb. 15. 1828.

Now these general conditions laid down for the whole estate, were contained in a separate paper, entitled, 'Articles and Conditions, laid 'down by Mr Gordon, for letting the estate of Slains.' Those conditions are 21 in number, and the 16th is the condition referred to. 'The whole fodder to be used upon the ground, and none sold or car-'ried away at any time, hay only excepted; and the dung to be laid 'upon the farm the last year of the lease.' Thus the matter stood when this came originally before the Court below; and the case was argued at considerable length as to the construction of this clause, and with reference to the point, to which I have called your Lordships' attention, whether it applied to the last year of the lease; but the Court did not think it necessary at that time to decide the general question, because they were of opinion that, upon the documents to which I have referred your Lordships, there was not sufficient to satisfy the Court that these regulations had been adopted by the tenant Mr Anderson. He did not subscribe this paper; and there was no evidence that he had seen it. Under these circumstances the Court were of opinion in favour of Mr Anderson, and they gave judgment accordingly. Afterwards, however, another document, to which I shall presently call your Lordships' attention,—a draft tack signed by both Mr Wilkins and Mr Anderson,—was produced by Mr Gordon; and Mr Gordon, on the ground of the production of this instrument, which had been signed by the tenant, and by which those regulations, as he contended, were adopted, applied to the Court to recall its former judg-

Feb. 15. 1828. ment. The Court, under these circumstances, did that which I am sure your Lordships will approve of—the Court did recall its former judgment; but they also added this condition, which I think your Lordships will also think a very fit condition to be added,—that as the case had now assumed a new shape, as Mr Gordon had not originally produced it before the Court, and as judgment had been pronounced against him in consequence of the defect of the case he himself had brought forward, if he was at this stage to be allowed to supply the defect, it should be on condition that he should pay the expenses. I think your Lordships will be of opinion, that was a proper condition to be imposed upon Mr Gordon. If your Lordships should be of that opinion, that will be an answer to one of the objections urged at the Bar on the part of Mr Gordon, that Mr Gordon should not pay those expenses. I think your Lordships will be of opinion that he ought.

The next question is, whether there was sufficient evidence to shew that the articles had been adopted. The instrument to which I have referred, was produced after this judgment had been pronounced, and was in these terms:—'It is contracted, agreed, and ended, betwixt 'Charles Gordon of Cluny, Esq. heritable proprietor of the estate of 'Slains, of which the lands and others after-mentioned are a part, and ' of the other part, in manner and to the effect following; 'That is to say, the said Charles Gordon, in consideration of the yearly 'tack-duty of money and victual underwritten, and of the other pres-'tations, conditions, stipulations, and reservations specified and con-'tained in a separate paper of General Articles, subscribed by him as 'relative to his leases of said estates, and to be held as part of these 'presents, hath set, and in tack and assedation let, as he hereby sets, 'and in tack and assedation lets, to the said 'and his heirs, secluding assignees and subtenants, legal or voluntary, 'without the express consent of the proprietor, All and Whole.' The paper of separate articles, which is here referred to, is the articles and conditions to which I have called your Lordships' attention, and which were entitled, 'Articles and Conditions laid down by Mr Gordon for 'letting the estate of Slains.' This draft tack was signed by the tenants, and among others by George Wilkins, who was a party to the original contract to which reference was made in the contract between Mr Gordon and Mr Anderson, and by which terms Mr Anderson was to be bound; and the draft tack was also signed by Mr Anderson himself in these terms:—'Mr Anderson agrees to the above, with this dif-'ference only, that his tack was a Martinmas entry. (Signed) JOHN 'ANDERSON.' The Court below was of opinion, on the production of this paper, that these articles were adopted by Mr Anderson, and that the original defect, which had led the Court to pronounce the judgment to which I have referred, was completely supplied. I think your Lordships will be of the same opinion. It was stated in argument at the Bar, and I believe was contended below, that this was a new contract; and that if a new contract, then, not having been entered into according

to the forms and ceremonies required by the law of Scotland, it could not be binding upon the parties. It was said that Mr Anderson was in possession of the property as a tenant under the original agreement; and that if this were an entire new contract, not being executed in the manner required by the law of Scotland, it could not have varied the original term: but I think your Lordships will be of opinion, as the Court below appears to have been of opinion, that this is not to be considered a new contract; that it is nothing more than a completion of the first contract. There were certain terms and stipulations by which the estate was to be held by the tenant, Mr Anderson; these terms and stipulations were also to be binding on Mr Wilkins. There was a reference by one contract to the other. If those are not the terms and stipulations, there are no terms and stipulations existing with respect to the farm; but Mr Anderson, by having subscribed this paper, though it was not subscribed till four years or three years after he entered on the farm, has identified it as containing the regulations by which he was to be bound. I think, therefore, if your Lordships will be of opinion that it is not to be considered as an entire new contract, that it is to be viewed as nothing but a recognition by Mr Anderson that those are the regulations referred to in this contract, namely those regulations which were to be binding upon him, in as much as they were for the general regulation of the estate of Slains. If your Lordships are of that opinion, the judgment of the Court below must, in that respect, be affirmed. I should therefore submit to your Lordships, that the judgment of the Court of Session, as to the construction of this clause, having been abandoned at the Bar, the judgment in that respect must be reversed; and I should submit to your Lordships, for the reasons I have stated, that your Lordships will be of opinion, that the judgment of the Court of Session with respect to the other question, namely, whether or not these terms and regulations were binding on Mr Anderson, must be affirmed. At the same time I also submit to your Lordships, that as this instrument was not produced in the first instance, the expense thrown upon Mr Gordon in the Court below is properly thrown upon him; and that part of the judgment must also be affirmed. Feb. 15. 1828.

Respondent's Authorities, (Colonel Gordon).—Countess of Moray, July 23. 1772, (4392.); Grant, July 10. 1788, (15,180.); Bell's Treatise on Leases, vol. i. p. 307.

STRACHAN and GAVIN, Appellants.—*Sol.-Gen. Tindal—John Campbell.* No. 2.

G. PATON and Others, Respondents.—*Lushington—Keay.*

Mutual Contract—Reparation—Expenses.—Ship-builders having agreed to repair and lengthen a whale ship at a certain rate of wages, and to make use of English oak; and, during the currency of the operations, the rate of wages of carpenters having,

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under the authority of the Justices of the Peace, been increased; and the ship-builders having made use of American instead of English oak; and the ship having been delivered as complete, and thereupon sent to the whale fishing at Davis' Straits, but, in consequence of the deficiency of the work, having been obliged to return to port, and been there detained for twenty-two days undergoing repairs; and having then lost the proper season for the Straits, and been sent to Greenland;—Held, (affirming the judgment of the Court of Session), 1. That the ship-builders could not charge a higher rate of wages than that agreed on; 2. That although American oak, at the time, was as expensive as English, and was then considered equally good, yet, as it was not so good, the ship-builders were responsible for the loss thereby sustained; 3. That they were liable for the expense of the repairs, and of the wages, &c. of the seamen, incurred after the vessel was brought back from the voyage to Davis' Straits; 4. That they were also liable for any loss suffered by the vessel not being able to go to Davis' Straits, or to reach Greenland at the proper fishing season; and, 5. That although the ship-builders were partly successful in the litigation, yet as the ship-owners prevailed in regard to their counter-claims, they were entitled to expenses.

Feb. 22. 1828.

1st Division. Lord Meadowbank.

On the 11th of July 1806, Paton and others, partners of the Whale Fishing Company of Montrose, and owners of the whaler Eliza Swan, directed their manager, Kinnear, to write to Strachan and Gavin, ship-builders at Leith, 'that they have now come to 'the resolution of having that vessel lengthened and repaired, 'and that they are desirous she shall be put into your hands: I 'therefore beg to know if you have got at present an empty dock 'that would admit her; if not, please say how soon. The season 'being now far advanced, I would wish her put into dock as 'early as possible. For the satisfaction of those concerned, it 'will be obliging if you will at same time give an estimate of the 'probable expenses attending the 13 feet which is to be put into 'her. In order to enable you to do this, I give you the follow-'ing particulars, viz. From the fore part of the main stem to the 'after part of the stern post aloft, is 89 feet; her breadth, at the 'broadest part of the main wales, 25 feet 10½ inches; her height 'between decks is 4 feet 8 inches, and admeasures 241 tons '59-94th parts. The additional length we mean to put into her 'is 13 feet. I am required also to request you to note the prices 'of your timber, planks, &c. and rate of wages, together with 'your dock dues: the timber must be all English oak; and if 'you have a sufficient quantity on hand for the repair of the 'ship, besides her lengthening, as she will need a certain quan-'tity of floors and foot-hooks; and we intend to make the deck 'flush fore and aft.'

Next day Kinnear wrote, that the depth of the hold was, from the keelson to the upper deck, 16 feet 18 inches; and requested Strachan and Gavin to note what the iron work could be furnished for.

On the 14th Strachan and Gavin answered, 'We have to in- Feb. 22. 1828.
'form you that the Eliza Swan may be taken into dock next
'spring tides, say about the 29th current. With regard to the
'expense of lengthening her, this cannot be estimated with any
'degree of correctness, unless we had the exact scantling of plank
'and timber, the average length of the midship planks in the
'bottom, &c.; but, from a rough calculation, we think the pro-
'bable expense of lengthening her 13 feet, would be about
'L.900. As the vessel will require other repairs, which would
'interfere with the lengthening, we think the best way for both
'parties would be to do the whole by day's work. The captain
'will have it in his power to keep an exact account of the arti-
'cles expended, and to turn off any workman that does not
'please him. We have on hand an excellent assortment of
'English oak timber, of a suitable size for the vessel.' A note of prices was added, and, inter alia, 'wages per day, 3s. 4d. 'common English oak timber per foot, girth measure, 5s.' Kinnear wrote in answer, that the vessel would be sent round as soon as possible, and requesting to be advised how soon 'you 'can engage to have the Eliza Swan lengthened and thoroughly 'repaired. The owners are anxious to have the job executed 'with all expedition.' Strachan and Gavin replied, 'If nothing 'material is to be done to the vessel besides lengthening, we 'think the repair may be completed in from two to three months 'after she is docked. At all events, you may be assured that no 'exertion will be wanting on our parts to finish the work with 'the greatest possible dispatch.' Kinnear then wrote, 'The ship 'will be off to-morrow, and round to you in a few days, and 'hope you will make every exertion to finish the ship soon and 'well. P. S.—As it is understood that nothing is to be put into 'the ship but English oak timber and Dantzic oak plank, to 'which you must bind yourselves by letter, as you did not men-
'tion in your letter of the 14th current the plank to be Dantzic.' Strachan and Gavin answered, 'The Eliza Swan is not yet 'arrived; we are all clear for her, and expect her up every tide. 'With respect to the materials, we have a good stock of English 'timber and Dantzic plank, and little or no Hamburgh; so that 'Captain Young will have it in his power to take what he likes 'best; and we hope to be able to execute the work to the satis-
'faction of every one concerned.' Kinnear afterwards wrote, 'I had a letter from Captain Young on the arrival of the Eliza 'Swan, and that she goes into dock on the 15th current, '(August), and hope you will put on her the best of materials,

Feb. 22. 1828. 'and likewise the best of workmanship on her, and return her 'as soon as possible.'

The vessel was received into dock on the 15th August, and the lengthening and requisite repairs proceeded in. Captain Young, the master, the ship-carpenter, and Mr Young, a part owner, superintended the workmanship. The vessel was sent out of dock on the 26th January following, and delivered over to the captain. The expense amounted to L.2685. 9s. 8d. of which L. 1350 were paid to account. During the currency of the operations the wages of carpenters were increased, under the sanction of the Justices of the Peace, sixpence per day more than they were at the date of the agreement. The owners were dissatisfied with the way the repair had been executed; and they alleged, that while the vessel was at Leith the imperfection of the workmanship had been remarked; that on the voyage from Leith to Montrose the vessel leaked to an alarming degree, and would have foundered if the weather had not been moderate; that on reaching Montrose, empty tree-nail holes were discovered; that after a repair there the ship proceeded to Davis' Straits, her original destination, on the whale fishing; but, on reaching Kinnaird's Head, her leaky condition compelled the captain to put back; that the bottom of the vessel was there judicially examined, and several deficiencies discovered in the outward planking, both as to the planks themselves and as to the caulking and plugging of the seams and holes; that after being repaired and detained at Montrose for 22 days, and the season, from this delay, being too late for Davis' Straits, the vessel was employed in the Greenland fishery; where, from the lateness of the season, and the continued leakiness, the fishing proved far from successful; that on returning to Montrose a more thorough inspection became necessary, when it was ascertained that not merely the doubling, but the main bottom itself of the vessel, had been left by Strachan and Gavin in a most insufficient state; that this required extensive and additional repairs; and that in consequence Kinnear wrote to Strachan and Gavin, on the 27th August 1807, in answer to their demand for payment of the balance of their account, 'I duly received your 'letter of the 17th instant, which I have laid before the Mon- 'trose Whale Fishing Company; and I have to hand you en- 'closed the account which the Company have made up against 'you, composed of overcharges in your account, expenses in- 'curred in consequence of the Eliza Swan being obliged to 'return, and of damages sustained by voyage of last year being

'rendered less valuable by the detention which was occasioned,— Feb. 22. 1828.
'amounting in the whole to L.1355. 16s. 4d. When you have
'deducted the above sum, and the payment of L.1350 that was
'made to you, the Company are willing to pay the balance that
'will then remain of the original principal sums.'

Strachan and Gavin declined a settlement on these terms, and brought an action against the owners before the Court of Admiralty, concluding for payment of L.1771. 5s. 6d. being the balance, with interest of their account. The owners, besides stating the above circumstances, pleaded in defence, that there was an overcharge in the price of the oak, the price being stated in the account at 6s. per foot, and in the rate of the workmen's wages, which were charged at 3s. 10d. per day; that the owners had a good counter-claim for the loss incurred in being obliged to dispatch the vessel to the Greenland instead of the Davis' Straits fishery, L. 550; and for the amount of the whole sums disbursed on the ship previous to the voyage to Greenland, and after returning, with wages and provisions to the crew, &c. being L.1355. 16s. 4d.; the difference between which and the sum sued for they were willing to pay; and to keep this defence in proper shape, they raised a counter-action.

A great deal of procedure took place before the Judge-Admiral, and, in particular, an interlocutor was pronounced on the 8th of June 1815, finding that Strachan and Gavin were not entitled to charge a higher price for the timber than that stipulated in the letters of agreement. A remit was made to professional men, and a proof allowed to both parties. In the course of the action, other defects in the vessel having become apparent, and especially that some of the iron bolts were short, and that in lengthening and repairing the vessel, Strachan and Gavin had used in various places American timber, the owners raised a supplemental counter-action, concluding, that Strachan and Gavin should immediately remove 'the American and other 'foreign timber, and American plank, used in the keel, keelson, 'lower deck wains, outside, and other parts of the said vessel, 'at lengthening and repairing her, and to replace the same with 'English oak and Dantzic planks, in terms of the agreement;' or that the owners should 'be entitled to do so at Strachan and Ga-'vin's expense, who should also be decerned to pay the damage in-'curred, and expenses disbursed by the owners in repairing the 'Eliza Swan, at various times subsequent to the 26th August '1808, the date of the account of over-charges, &c. before re-'ferred to, on account of the careless and improper manner in

Feb. 22. 1828. 'which the work was originally performed by the said Strachan 'and Gavin, the insufficiency of the materials, and the deviation 'from the agreement.' Thereafter, in the conjoined actions, the Judge-Admiral pronounced this judgment:—'In respect 'that, by the letters of agreement entered into between the 'parties in July 1806, the repairs in question were stipulated 'to be made by days' wages, and at a rate of a fixed sum per 'day, and that no satisfactory proof has been brought (indepen- 'dent of the objections to the pursuers' witnesses) of any such 'general practice in the trade as will justify a higher charge in 'the event of a rise of wages; finds, that the pursuers are not 'entitled to charge for carpenters' work at a higher rate than '3s. 4d. per day; therefore sustains the objections to the over- 'charge of 6d. per day, amounting in whole to L. 69. 6d. ster- 'ling. In respect of the final interlocutor of 8th June 1815, 'finds, that the pursuers are not entitled to charge for timber at 'a higher rate than that specified in the letters of agreement; 'and therefore sustains the objections that a part of the timber 'is charged at 6s. per foot instead of 5s., and allows a deduction 'accordingly to the amount of L.35. 8s. 6d. sterling. With regard 'to the objection that some American oak was substituted in place 'of English oak, finds, that by the letters of agreement the whole 'timber was to be English oak, and that the pursuers ought not to 'have made use of any other oak in the repairs; but in respect 'that some persons were employed by the defenders to superintend 'the work, and that the vessel was benefited to the extent of the 'oak furnished, finds, that the pursuers are entitled to charge 'for the price of American oak, and appoints each party to 'give in a short minute on the question what these charges 'should be: Repels the objection made to the period occupied 'in repairing the vessel, in respect that there were some persons 'employed by the defenders to superintend what was going on; 'and that satisfactory evidence has not been brought that there 'was an unreasonable delay: Repels the whole other objections 'stated to the pursuers' account. And with respect to the 'defenders' counter-claims stated in the defences, and in the sup- 'plementary action, finds it sufficiently instructed by the evidence 'of the carpenters who inspected the vessel, by the leakage of 'the vessel on her voyage from Leith to Montrose, in the at- 'tempted voyage to Davis' Straits, and in the voyage to Green- 'land, that the repairs made upon the vessel by the pursuers 'were insufficiently executed, and that the defenders are entitled 'to all reasonable damages which they sustained in consequence

'of the insufficiency of the work. Therefore finds the defenders Feb. 22. 1828.
'entitled, 1*st*, To the expense of the repairs which the vessel
'received at Montrose before she sailed for Davis' Straits (Green-
'land), amounting to L. 44. 9s. 1½d sterling: 2*d*, To the expense
'of wages to the captain and crew of the vessel for the twenty-
'two days occupied in repairing her at Montrose, amounting to
'L. 248. 7s. sterling: 3*d*, To the expense of the repairs which the
'vessel received after her return from the Greenland voyage,
'amounting to L.194. 12s. 7d. sterling: Repels the claims of the
'defenders, founded on the damages alleged to have been sustained
'by the unsuccessful fishing at Greenland, in respect the voyage
'appears to have been pretty successful, and that a claim of this
'kind partakes too much of the nature of consequential damages:
'Repels also the claim of the defenders, founded on the demand
'for the vessel being now repaired with English oak instead of
'American oak, in respect of the long period which elapsed
'before this claim was brought forward, and that it ought to
'have been insisted in when the vessel was repaired at Montrose.
'Remits to the depute-clerk of Court to make up a state of the
'sums found due by this interlocutor to each of the parties res-
'pectively; and to report whether any, and what balance will
'be thereby due by the one party to the other: Lastly, Finds
'the pursuers liable in the whole expenses of process, includ-
'ing the different surveys of the vessel, and the expense of the
'judicial proceedings at Montrose.' This was followed by a decerniture for L.31. 5s. being the amount of other necessary repairs.

The parties then stated in a joint minute, that, assuming the correctness of the principles in the interlocutor, there was no dispute, either as to the price of the American timber, which at the period of the repair was as high as English oak, or with regard to the general balance to be brought out; and the Judge-Admiral thereupon recalled the inquiry as to the American oak, and found a balance of L.682. 10s. 4d. with interest, due by Paton and others, under deduction of expenses incurred by them, which were afterwards modified to L.250. 14s. 7d. These judgments having been brought before the Court of Session, the Lord Ordinary advocated the cause, and pronounced this judgment:—'Finds, that the repairs
'in question were stipulated to be made by workmen engaged
'by days' wages, and removable at the pleasure of the persons
'engaged by the defenders to superintend the work: Finds, that
'although in the letter of the 14th July 1806, the rate of wages

Feb. 22. 1828. 'at the time in Leith was specified, it was not expressly agreed 'that during the progress of the work that rate might not be 'varied or altered: Finds, that in all engagements to execute 'work, not for a slump sum, by measurement, or the like, but 'by workmen engaged by the day, and without limitation, in the 'most express terms, of the amount of their wages, it is neces-'sarily understood and inferred that the whole burden thereof is 'to be upon the actual employer, whether they may exceed or 'fall short of the rate at which they stood when the work is com-'menced: Finds, that in this case the defenders must be held to 'have been the actual employers of the workmen, who were ac-'cordingly liable to dismissal at their pleasure, or that of their 'superintendant; and that as the letters of agreement founded on 'did not, in express terms, take the pursuers bound to furnish 'workmen at the rate of wages payable in Leith when the work 'commenced, the defenders are liable for the rise on that rate 'which it is proved took place in that port during the operations 'in question; and accordingly repels the objection to the charge 'of 6d. per day, in addition to 3s. 4d. for each workman charged 'in the account, amounting in whole to L. 69. 6d. and decerns 'accordingly: Finds it sufficiently established, that, in the 'language of the trade, there are employed in ship-building com-'mon English oak, as well as oak of a superior description, and 'bearing a higher price than the former: Finds, that it must be 'inferred that the defenders were aware of this distinction, and 'that, in the letter of the pursuers of 14th July 1806, the price 'of 5s. per foot, stated as the price of English oak timber, was 'specially stated to refer to common oak; and that in the letter 'of the 7th of August it was specially stated, with respect to 'materials, that Captain Young might select what he thought 'fit: Finds, that the work was superintended by Messrs Young, 'and the materials employed in the repair were selected under 'their inspection, and with their approbation and consent; and 'accordingly, that the account now pursued for was certified by 'them: Finds, that it was competent for them to authorize the 'employment of oak of a quality superior to common oak, and 'that for such exercise of these powers the defenders are liable: 'Finds, that a certain quantity of superior oak was consumed 'accordingly, for which 6s. per foot is charged; therefore repels 'the objection to the said charge, and decerns: Finds, that in 'the account libelled there is no charge made for plank for new 'doubling the vessel, and therefore that the defenders are not 'entitled to place to the debit of the pursuers the price of the

'plank employed at Montrose for new doubling the vessel: Feb. 22. 1808.
'Quoad ultra, adheres to the judgment of the Judge-Admiral on
'the merits, and finds, declares, and decerns accordingly; but
'on the question of expenses, as well in this Court as in the
'Admiralty Court, appoints parties' procurators to be ready to
'debate.'

Paton and others reclaimed to the Inner-House, and their Lordships remitted the case to Mr Stone, master-builder in his Majesty's dock-yard at Deptford, requesting that he will 'con-
'sider the same with the proof; particularly as the same regards
'the mode in which the bolts were driven and clinked, and the
'length and sufficiency of the beams, and report his opinion
'thereon to the Court.'

Mr Stone reported,—'I am of opinion, from the testimony of
'Mr Mearns, which does not appear to be invalidated by any
'contrary evidence, that in the instance stated the work was in-
'sufficiently performed: viz. that, in particular, two of the bolts
'were too short, and, being driven from the outside, did not go
'through the knees so as to clench; and pieces of bolts were
'driven from the inside, to make it appear that they were whole
'bolts properly clenched. Mr George Mill gives evidence to
'the same effect. Such a state of work has determined my
'opinion, that it must be considered insufficient. Each party
'appear to admit the vessel was leaky when she arrived at
'Montrose, although the respondents' evidence insinuates it was
'not more than is customary, especially after so large a repair.
'I should rather argue, that the larger the repair, the better
'opportunity would have been afforded to make a ship tight; as
'thereby all the parts of the vessel would pass more particularly
'under observation. John Thom deposes, that in 1807 "the
'vessel required to be properly caulked;" and he discovered
'one tree-nail hole of an inch and a quarter empty, and which
'never had a tree-nail in it; and that there were also some empty
'nail-holes. John Flockhart found two holes open; one for a
'tree-nail, the other for a nail. James Slowright deposes, that
'two holes were discovered on the starboard side; the one was a
'good large hole, made, as he supposes, by an inch augre, the
'other by one of three-fourths of an inch. I am of opinion there
'was a great neglect in allowing one hole to remain open;
'and, if the evidence of more holes is to be depended upon, of
'course the neglect is enhanced; for in all cases, before putting
'on doubling, it is considered a matter of duty to perfect the
'bottom, by driving all fastenings, and by caulking it before the

Feb. 22. 1828. 'doubling is put on. I have duly considered the reply of the 'respondents; and, admitting that these holes were not in that 'part of the work which had been performed by the respondents, '(viz. where the ship was lengthened), and also that these holes 'did not go through the outside plank or doubling, and, in ad- 'dition, that they may have formed an original defect; as the 'ship was put into the hands of the respondents to be made 'perfect, I am decidedly of opinion such an omission must be 'attributed to neglect, as the whole of the bottom must un- 'doubtedly have been caulked, after so large and extensive a 'repair. The respondents say, "that the surveyors explicitly 'state, that they could find nothing materially wrong with the 'ship, except that the caulking was a little slack;" which they '(the respondents) deny as being the case when she left Leith, '"and that some of the tree-nails wanted plugging." From the 'whole of the evidence I am constrained to conclude, that had the 'ship been properly turned out of hand, it would not have been 'necessary to have again caulked her on her return to Montrose. 'As to the length and sufficiency of the beams, I am totally at a 'loss to account for any motive in the respondents in allowing 'of such a thing; but still I admit the probability, that the beam 'said to be five inches short, might have been so much short, or 'nearly so, when put in. It is stated that the ship measured, in '1807, 26 feet 6 inches in breadth, and in 1813, 26 feet 11 'inches. If the ship had become wider by working, the beams 'next forward and abaft would have partaken of a posture, so as 'gradually to have become less short of the timbers as they ap- 'proached forward and aft. I am humbly of opinion, if the ship 'had become five inches wider in the midships, where she had 'been so recently lengthened, and where all the work was new, 'and I apprehend, from the shortness of time, the timber must 'have been sound, a proper security would not have been given 'to connect the beam to the side; or if the beam was short when 'put into the ship, in either case there must have been either 'want of judgment in proportioning the quantum of fastening, 'or negligence in the execution of the work. As to some of the 'materials being American oak—at that period, viz. 1807, Ame- 'rican oak being of a recent importation, the public opinion was 'very favourable to it as a substitute for English oak. The re- 'spondents, therefore, I think must be exonerated from moral 'blame, as the price was nearly equal to English oak, consider- 'ing the mode of measuring each description of timber; but 'experience has since proved, that in a very short time oak of

'American growth becomes very defective, and is very subject Feb. 22. 1828.
'to fungi.

Upon advising the cause, with this report, the Court, on the 24th June 1824, 'approved of the report, and altered the interlocutor of the Lord Ordinary, so far as regarded the additional charge of 6d. per day on wages, and of 1s. per foot on timber; of consent, adhered to the interlocutor so far as the petitioners' claim of deduction for dock dues is repelled; altered the interlocutor so far as regarded the charge made by the petitioners for plank for new doubling the vessel at Montrose; and so far also as regarded the counter-claims of the petitioners on account of the repairs made by them on the vessel in 1811 and 1814, as well as on account of the short fishing in 1807; and on account of the substitution of American for English oak, in the original repairs executed by the respondents: Found the petitioners entitled to damages for the short fishing in 1807, and for the breach of contract in the substitution of American for English wood, in the repairs made at Leith; and before farther answer to these damages, appointed the petitioners to give in a condescendence of the particulars and amount.'

Thereafter Paton and others offered 'to accept of L.100 as a cumulo sum in name of damages, both for the short fishing, and for the violation of the contract with respect to the wood employed in the repair;'—the consent to this proposal not to affect Strachan and Gavin's right to appeal from the interlocutors hostile to them in causa. On this proposal being agreed to, the Court, 2d March 1826, decerned accordingly.*

Strachan and Gavin appealed.

Appellants.—The vessel was substantially and carefully repaired in 1806 and 1807. This was done under the superintendence of the respondents' agents. She was sunk in dock to ascertain whether there was either any insufficiency in caulking, tree-nailing, or plugging; but there was then no appearance of any deficiency, nor were any of the lower-deck beams too short before being put in; nor were any tree-nail holes observed to be empty, and any trifling leakage in the voyage between Montrose and Leith, was not more than is uniformly attendant on such an extent of repairs as the vessel had received. It is therefore not competent to make the appellants liable for further repairs required in 1811 and 1814, after the vessel had been voyages to Greenland. Indeed, these repairs were exactly such as every ship, sound,

* 3. Shaw and Dunlop, No. 194.

Feb. 22. 1828. as she may have been, required on returning from such an employment. Vessels in the Greenland trade are exposed to peculiar accidents, and cannot fail being strained and shattered in their collision with icebergs and exposure to inclement weather. No log-book has been produced, the detail in which might satisfactorily have accounted for the vessel being put out of shape. The starting of bolts, nails, &c. is owing to the same cause. The vessel was already old and frail when sent to be repaired. As to the American oak, Captain Young had the power of selecting what timber he chose. He did so, and in this partook in the common opinion of its value. In using it, the appellants acted with perfect bona fides, and no loss has arisen from its substitution. As to the price charged for the oak, common oak was 5s. per foot; but superior oak, requisite for particular parts of the ship, cost 6s. The wages for workmen were raised by the Justices of Peace, over which the appellants had no controul. In mentioning a rate at all, the appellants meant the current rate while the work was proceeding. On the other hand, the respondents have made extravagant charges for wages and provisions to their captain and crew; and it is clear, that the pretended loss in the fishing is by far too consequential a damage to be admitted into consideration in a question of the present kind. It was irregular and incompetent in the Court below to delegate to Mr Stone to judge of the proof, and the judgment which he has given proceeds on erroneous ideas.

Respondents.—The overcharges in the appellants' accounts relate, first, to the wages; and, second, to the oak. In regard to the wages, nothing was said in the agreement that the rate was to depend on circumstances,—a precise sum was stated, and it matters not what the Justices decided. As to the oak, no hint was given that two kinds of oak, a common and a better, would be necessary. On the other hand, the respondents have various counter-claims. They are entitled to be indemnified for the loss sustained by the insufficient repairs of the vessel, arising from being unable to send the vessel to the proper fishing station at the proper season; the wages and provisions of the seamen during her detention; the expense of repairs; and the substitution of an inferior species of oak, different from that stipulated for. The Court did right in a case of this nature to remit to Mr Stone; but they themselves exercised their own judgment on the proof, and only availed themselves of his professional assistance.

The House of Lords 'ordered and adjudged, that the interlocutors complained of be affirmed.'

LORD CHANCELLOR.—My Lords, There was, on a former day, a case argued before your Lordships, of Strachan and Gavin, appellants, and George Paton and others, respondents. Feb. 22. 1828.

My Lords,—Paton and others were the owners of a ship called the Eliza Swan, which was a vessel employed in the whale fisheries. The vessel was out of repair, and they were desirous of having it repaired, and also of having it lengthened. They applied to the appellants, Messrs Strachan and Gavin, ship-builders at Leith, for the purpose of their undertaking those repairs. The owners of the vessel lived at Montrose.

Before the vessel was sent to Leith, a correspondence took place between the parties, as to the terms upon which the vessel was to be repaired. A Mr Kinnear, who was the manager for the respondents, (who were in fact a Company calling themselves The Whale Fishing Company of Montrose, and their business in this department seems to have been managed by Mr Kinnear), wrote to the appellants upon the subject of the repairs of this vessel. (His Lordship then quoted the letters and answers).

That is the correspondence which took place previously to the work, which was to have been completed in about two or three months. The vessel, however, was not turned out of dock until about six or seven months, and on being turned out of dock she immediately proceeded to Montrose. The voyage from Leith to Montrose commonly takes up about twelve hours. During that passage she made an incredible quantity of water, so much so that the crew were obliged to pump incessantly. The pumps at last were choked; and the evidence is distinct and clear that the vessel would have been water-logged, if they had not got into Montrose without delay. It became necessary at Montrose to examine the vessel, and to stop the leak or leaks. They found at least one tree-nail hole, in which no tree-nail had been rivetted. They did what they thought necessary upon that cursory inspection, and the vessel is sent almost immediately afterwards upon her intended voyage to Davis' Straits, for the purpose of fishing. It was found, however, almost immediately after she left Montrose, that she was in such a condition that it was impossible to pursue that voyage with safety. The crew were dissatisfied, and a meeting of the officers was held by the captain, and the result was, that before they got far on the voyage, it was absolutely necessary to return. According to the protest of the captain, the vessel made eighteen inches of water in an hour. She was obliged to be constantly pumped four or five spells in the course of a watch; and it was absolutely necessary (there is no contradictory evidence on that head) that the vessel should return in consequence of her imperfect condition to Montrose. She was then repaired, and during those repairs she was detained during a period of twenty-two days. At the expiration of that time, instead of pursuing her voyage as originally intended, she went to

Feb. 22. 1828. Greenland, and returned after the usual time with an imperfect cargo, —a cargo, as far as I remember, of not more than two-thirds.

Afterwards, upon her return from this voyage, she was again inspected. The repairs before she set out on this voyage had been done with as much expedition as possible to fit her for the voyage, and a more accurate inspection was had after her return from the Greenland voyage, and other repairs were done.

In the year 1814 she was again inspected, and upon that inspection it was found, that some of the beams which were put in, instead of being of English oak, were of American oak; three or four were decayed at their extremities,—it being found that American oak decayed more rapidly than English oak. It was discovered also that she was not properly bolted; that some bolts driven in were too short, and not clenched, and, to give them the appearance of passing through, there were short ones put on the other side; that is sworn by one witness distinctly. Repairs were done in the year 1814, and, as I believe there is no difference with respect to the amount, the question will be ultimately as to the principle.

The first question that will arise will be, whether or not the ship-wrights at Leith, having instituted the suit against the ship-owners for the recovery of the sum due for the repairs, amounting to L. 1700, any reduction should be made in this case in consequence of the insufficiency of the repairs? According to the law of this part of the island, much that is insisted on the part of the defendants would have been the subject of a cross action; but no such question arises according to the state of the pleadings in this case. It is perfectly clear, without going in detail through the evidence, (for really the evidence is all on one side, and not contradicted), that the vessel was sent out in an imperfect condition and state from the dock-yards of the ship-wrights at Leith. The expenses incurred in the first instance, after the return of the vessel to Montrose, upon her intended voyage to Davis' Straits, ought, in my judgment, to fall upon the ship-wrights at Leith. They undertook to do the work perfectly, and they were bound to do so; and it is quite clear from what took place, and the evidence arising from the inspection—it is absolutely certain—that that work became necessary in consequence of their default. It is proper also to observe, that not only is the evidence all on one side, but, before these repairs were done, a letter was written to the ship-wrights at Leith, and they sent over their foreman, Mr Temple, to view the state of the vessel; and as Mr Temple directed no witnesses to be examined on that side, I apprehend it is perfectly clear, in point of evidence, that the expenses at Montrose ought to fall upon the ship-wrights at Leith.

I think the same argument applies to what took place after the return of the vessel from the first Greenland voyage. Upon taking off the doubling, it was found she was in an imperfect condition in many respects. Without troubling your Lordships with the details of the

evidence, which I have read through with great attention, I am quite satisfied upon the weight of evidence, that what was then done was absolutely necessary to be done, and that it resulted from the omission of the ship-wrights at Leith. Feb. 22. 1828.

In the year 1814, which is several years afterwards, as I have already stated to your Lordships, the vessel was inspected, and it was then those defects, to which I have particularly called your Lordships' attention, were discovered. The vessel was examined by persons every way competent to form a judgment. It is sworn, that at that period some of the beams that were put in were too short, and the circumstance with respect to the improper driving of the bolts is sworn to by persons every way qualified to judge. The circumstance to which I have already directed your Lordships' attention, namely, that some of the bolts, one of them if not more, were too short, and that bolts were driven in on the other side, to give them the appearance of having passed through, is distinctly sworn to. The whole of that evidence was submitted by the Court below to Mr Stone, the master ship-wright at Deptford dock-yard, and he has made a report; and I do not at all concur in the observations made at the Bar upon that report, for I find no fault with regard to the general scope and tenor of it;—he is of opinion that those defects, then discovered in 1814, were the effects of the imperfect manner in which the work had been done by the ship-wrights at Leith. I am ready to make every allowance for the interval of time that has elapsed from 1806 to 1814, and particularly with respect to a vessel engaged in the Greenland fisheries; but still, looking at this evidence—paying attention to it, and making every fair and just allowance—the impression upon my mind is, that it is satisfactorily made out, that those defects which were discovered in the year 1814, and which were then repaired, are properly referable to the original omission of the ship-wrights; and if so, I think they are bound to make compensation. The Court below were of that opinion. I concur in that opinion, and I humbly submit to your Lordships that it would be proper, in that respect, to confirm the opinion of the Judges in Scotland.

Your Lordships will not think it necessary for me to read the evidence to you. It is very voluminous, and in detail. I state fairly, that, after much attention, that is the result of the impression it has made upon my mind. I think the evidence is all one way. There is much reasoning, and very good reasoning, on the other side; but almost all the evidence is in favour of the present respondent.

Another question that arose, which, though not a question very material in point of amount, is not immaterial in principle, was this: The vessel was detained upon the first repair twenty-two days at Montrose. She afterwards sailed upon her fishing voyage, and came back with an imperfect cargo. The owners of the vessel claim compensation upon this account. The answer that is given, or at least one of the answers, is this, Why, if the vessel had sailed, you are not sure,

Feb. 22. 1828. upon so precarious an adventure, that she would have come back with a larger cargo. But if a vessel is detained for twenty-two days, at a time when she ought to have been on her voyage, (and she was detained these twenty-two days in consequence of the deficiency of the repairs of the ship-wrights), and the parties have been deprived of the fair chance of gaining the advantage resulting from the use of their vessel during that time, I apprehend they are entitled to compensation in the shape of damages. Your Lordships will be relieved from all consideration upon the amount of damages, because the amount has been agreed upon between the parties, provided your Lordships are of opinion that the owners of the vessel are, in consequence of this default on the part of the ship-wrights, entitled to recover. I am quite satisfied, upon an action so framed in this part of the island, that damages would be recovered, for the parties had lost for twenty-two days the use of their vessel.

There is another point that was made upon this appeal, to which I must also call your attention; and that is with respect to the use of American oak. It was, as your Lordships will recollect, by reference to the letters to which I called your attention, distinctly and expressly directed, that no oak should be used except English oak. It is stated in two distinct parts, in terms the most precise and explicit. It turned out that American oak was used in several parts of the work. I do not mean, nor do the parties who are concerned in this appeal, mean to impute moral blame to the ship-wrights for using American oak instead of English oak, because at that period, according to the evidence, it was supposed that American oak was as good as English oak; and the evidence states that the price was about the same; but it has turned out in the result—the evidence establishes the fact—that American oak decays much more rapidly than English oak, and in the present instance the orders were 'English oak.' These orders were accepted by the ship-wrights, and by the acceptance of those orders it was incumbent upon them to see that nothing but English oak should be used: if they took upon themselves to use any other, they have been guilty of an infringement of the contract; and if they have been guilty of an infringement of the contract, they are liable to an action, and liable to make compensation in damages for the consequences that have resulted from the breach of that contract. Your Lordships will not be troubled with fixing the amount, because on this head the amount of damage has been agreed upon, if your Lordships are of opinion that the respondents are in this respect entitled to recover. The only ground upon which it is resisted is, that Captain Young was present at the time. But I do not find that Captain Young was vested with any authority to dispense with the terms of this written contract with regard to the particulars I have before alluded to; and if the parties take upon themselves to use American instead of English oak, contrary to the terms of their contract, supposing it to be as good,—if it has turned out that their judgment is erroneous, they are bound, I

think your Lordships will feel, to make compensation to the ship-owners. Feb. 22. 1828.

There are two other points remaining for consideration. Before the vessel was sent to Leith, the Company took the precaution to direct their agent to write a letter to ascertain the probable expense of lengthening the vessel, and to ascertain the rate of charge with respect to the wages and materials. I will again direct your Lordships' attention to that part of the letter. 'I am required also to request you to 'note the prices of your timber planks, &c. and rate of wages, together 'with your dock dues. The timber must be all English oak.' In answer to that it is said, 'The prices are noted on the other side. 'Note of prices,—wages per day, 3s. 4d., common English oak timber 'per foot, girth measure, 5s.' For a part of the time those wages, 3s. 4d., were charged, and for a part of the time an increased rate of sixpence was charged; and the ground upon which this increased charge was made was, that in fact, while this work was going on, there was a general increase of wages at the rate of sixpence a-day; but I apprehend that, looking at the distinct and precise terms of this contract, your Lordships will be of opinion, if any loss arises from that increase of wages, it ought to fall, not upon the ship-owners, but the ship-wrights. The parties sent to know the rate of wages. 'What do you mean to 'charge?' '3s. 4d. a-day.' It does not appear that 3s. 4d. a-day is the price that is paid to the men: 3s. 4d. is the price that the ship-wrights are to charge the ship-owner. There is no evidence to shew the actual price paid to the labourers by the ship-wrights. I consider that they contract, 'While this work is going on we will charge at the rate 'of 3s. 4d. No matter what contract we have made with our men. 'We may agree with them by the day, by the week, or by the year. 'We may employ our apprentices, who are perhaps not paid at all, or 'at a very low rate. We shall charge you 3s. 4d.' And if an increase has taken place before this work was completed, the loss I think ought in justice to fall upon the ship-wrights.

The other point is as to the common English oak. That is charged in the note at 5s. and part of the timber has been charged at the rate of 6s.; and the ground upon which that charge is made is, that it was oak of a superior quality, and ought to be charged at the rate of 6s. I apprehend, when your Lordships consider the nature of the case, you will think they were not justified in making that charge. When they say that common oak is to be charged at such a rate, the party is deluded unless that is meant to apply to the general run of oak timber throughout the vessel. It was incumbent upon them to have stated that the common oak timber was to be charged so much, but that it was necessary for certain purposes to use superior oak, to be charged at an increased rate. I apprehend your Lordships will think the appellants' saying the price was 5s., without making any distinction as to the use of any superior oak timber, must be considered bound by it. But the case does not rest here; and they say, for the beams, and the

Feb. 22. 1828. keel, and the keelson, and for the knees, superior oak timber is requisite: but upon the evidence it turns out, that in the keel and keelson, or in a great part of what they did, they did not use superior oak timber, which means superior English oak timber, but they used American oak; and it appeared also, as to some of the knees, that they were American oak. Therefore I think upon the fact, that they are not entitled to have this charge sustained. It does not amount to any considerable sum. This is the last point to which it is necessary to call your Lordships' attention. Upon all of them, after reading the evidence, and considering with attention the argument urged at the Bar, I feel disposed to concur in the judgment pronounced in the Court below.

There is one remaining point, which relates to the expenses. The expenses of those proceedings have been, by the Court below, thrown upon the ship-wrights. Now it is said at the Bar—and upon the part of the appellants the case was argued by English Counsel—that that is not just, and does not correspond with our practice in this part of the island, because the ship-wrights have recovered a considerable part of their demand. They have recovered to the extent of L.600, and having recovered to that extent, it is very hard and unjust that they should have to pay all the expenses. But I think, in the first place, that the rules with respect to costs in this part of the island, are rules of practice, and rules of law established with regard to our proceedings. We cannot well reason, from our practice, as to questions in courts in any other parts. But if we come to sift the question, I do not think the argument applies in the manner in which it is pressed. If this inquiry had taken place in England, there must have been two actions. The ship-wrights must have proceeded in their action to recover their demand, and the ship-owners must have brought a cross action for the damage they had sustained by the imperfect manner in which the contract was executed; and these two actions must have gone to their termination as two separate actions. Upon the action for damages brought by the ship-owners, if they recovered, they would have recovered the entire costs. Now when we advert to these proceedings, almost all the expenses result out of that part of the investigation. Therefore, applying the principle that prevails in this country, and the practice in this country, to the proceedings in this instance, it appears to me that the result would be nearly the same. And with respect to the action brought by the ship-wrights, the ship-owners would have had an easy mode of obviating the necessity of paying costs in that action. He would have said, 'I claim to deduct two 'items,—that part of your charge for superior oak, and that part of 'your charge for wages.' He might have paid into Court the difference; and if the party had gone on to try the merits of the case, as far as it relates to these points, and he had failed, the costs of the action would have been thrown upon the ship-wrights; and therefore, as, when we apply the principle that prevails here to this particular

case, there would not be much diversity in the result between that which took place in Scotland and what would have taken place here, I should submit to your Lordships that that part also of the decision of the Court below—throwing the expenses on the appellants—should be affirmed. If your Lordships concur with me in opinion, the effect will be to affirm the judgment of the Court below with respect to those several points. Feb. 22. 1828.

SPOTTISWOODE and ROBERTSON—MONCREIFF, WEBSTER, and THOMSON,—Solicitors.

Poor ISOBEL M'DIARMID and Husband, Appellants. No. 3.
Fullerton—Wilson—Bere.

JOHN and JAMES M'DIARMID, Respondents.
Keay—T. H. Miller.

Fraud.—A daughter and her husband having obtained from her father, who was eighty-three years old, facile, and addicted to habits of intoxication, a deed in the shape of an agreement and obligation between them and him, by which he conveyed to them, without any onerous consideration, funds of the value of about L. 4000, reserving an annuity of L. 40 out of these funds; and which deed was prepared by their agents without the intervention of any man of business on his part; and under the erroneous impression that unless he executed it he might be reduced to poverty;—Held (affirming the judgment of the Court of Session), That the deed was not binding on him.

JOHN M'DIARMID had, by his wife Catherine Cameron, two sons, Angus and Hugh, and two daughters, Christian and Isobel, the latter of whom (the appellant) was married to Daniel Drummond, farmer in Perthshire. Angus was a vintner in Edinburgh, and after having been married for several years, he and his wife executed, in 1813, a mutual trust-disposition and deed of settlement, by which she renounced her legal, and accepted conventional provisions, and under burden of certain legacies the residue was provided to the issue of Angus, if he should have any; and the deed then proceeded in these terms:—'In case I, the said Angus 'M'Diarmid, shall leave no issue of my body, of the present or 'any subsequent marriage, at my death, or their afterwards failing, 'then our said heritable and moveable means and estate before 'disponed, shall fall and belong to John M'Diarmid and Cathe-'rine Cameron or M'Diarmid, my father and mother, and the 'survivor of them; whom failing, to Hugh M'Diarmid, present-'ly residing in the neighbourhood of London, Christian M'Diar-'mid and Isobel M'Diarmid or Drummond, wife of Daniel March 28. 1828.

1ST DIVISION.
Lord Eldin.

March 28. 1828. 'Drummond, farmer in Cowden, near Comrie, my brother and 'sisters, equally among them, their respective heirs, executors, 'or assignees.' It was also provided, that 'in case of the said 'John M'Diarmid, my father, surviving his present wife, my 'mother, and marrying again, in the event of them or him suc- 'ceeding as aforesaid to our said heritable and moveable estate 'before disponed, his right shall determine, and the same shall 'devolve and belong to my said brother and sisters, before named 'and designed, and their foresaids; and in place thereof, the said 'John M'Diarmid, my father, shall have right to the said house 'presently occupied by him and my mother at Quarryholes, in 'liferent during his life, and my said trustees shall make pay- 'ment to him of L. 40 sterling per annum, to be paid him quar- 'terly, per advance, during his lifetime.'

On the 10th of February 1823 Angus died without issue, and was survived by his wife and by his father, in the latter of whom, (according to the provisions of the above deed), his property vested, subject to the burden of the widow's annuity and the legacies.

The property was partly heritable and partly moveable, and amounted to about L. 6000. The rents of the heritable subjects were said to yield L. 300 a-year.

At this time the father was a widower, and eighty-three years old. His other son Hugh, and his daughter Christian, were dead; and therefore his daughter Isobel, the wife of Drummond, was the next substitute, and was entitled to succeed to the property in the event of her father marrying a second time. The trustees accepted and entered into possession. On the extent of the property being ascertained, the widow of Angus brought a reduction of the deed, with the view of betaking herself to her legal provisions, and in which, if successful, the succession would be diminished to about L. 4000. Immediately on hearing of the death of Angus, Isobel and her husband came to Edinburgh, and took up their residence in the house of Angus, along with her father and the widow. Towards the end of March they employed their own agents to draw a deed in the form of a mutual agreement and obligation, by which the father, in consideration of the payment of an annuity of L. 40 out of the trust-funds, was to convey to them the whole succession which he had acquired by the death of Angus. This deed proceeded on the narrative that 'It is contracted, agreed, and ended, between the parties follow- 'ing, viz. John M'Diarmid, lately residing in Quarryholes, at 'present in Edinburgh, on the one part; and Isobel M'Diarmid 'or Drummond, wife of Daniel Drummond, farmer in Cowden,

'near Comrie, and the said Daniel Drummond, her husband, March 28. 1828.
'for his interest, and as taking burden on him for his said wife,
'and these two spouses, with joint assent and consent on the
'other part.' After reciting the trust-disposition and settlement, the deed then proceeds in these words:—'And now seeing that
'the parties to the present deed have arranged and agreed that
'the said John M'Diarmid shall enjoy an annuity of L.40 per
'annum out of the foresaid funds, in lieu and place of the rights
'that have opened to him by the death of the said Angus
'M'Diarmid, which shall determine from this date, and shall
'devolve and belong to the other persons named in the foresaid
'deed of settlement: therefore, on the one part, and in considera-
'tion of the foresaid annuity of L.40 per annum, the said John
'M'Diarmid hereby, for himself, his heirs, executors, and suc-
'cessors, renounces and discharges all his right to and interest
'in the property, heritable and moveable, conveyed in trust as
'aforesaid, (excepting the annuity); and he hereby binds and
'obliges himself, and his heirs, executors, and successors whomso-
'ever, to come under no obligation, and to make, grant, and
'subscribe no deed or deeds inter vivos or mortis causa, whereby
'the terms and purposes of the foresaid deed of settlement shall
'be altered or departed from, or defeated in any respect, from
'and after the date of the present deed, or the rights of any of
'the parties substituted to him shall in any way be affected; but
'on the contrary, he hereby expressly agrees and declares, and
'binds and obliges himself and his foresaids, that his right to the
'foresaid heritable and moveable estate, excepting to the extent
'of the annuity of L.40 sterling, before and after mentioned,
'shall henceforth cease and determine, and the same shall de-
'volve and belong, and the said John M'Diarmid hereby gives,
'grants, assigns, and dispones, from him and his foresaids, the
'same, to the person or persons having right after him to the
'said heritable and moveable property by the foresaid deed of
'settlement: And further, the said John M'Diarmid binds and
'obliges himself and his foresaids to make, grant, subscribe, and
'deliver all dispositions, assignations, renunciations, or other
'deed or deeds, in legal form, conveying all right vested, or that
'may be vested in his person, or in the person of the foresaid
'trustees for his behoof, by the foresaid deed of settlement, to the
'foresaid trustees themselves, or to the second parties to the
'present deed, or to such other person or persons, or in such way
'and form as may be deemed necessary for carrying the purposes
'and intentions of the present deed into full effect: and he

March 28. 1828. 'declares, that any deed or obligation to be granted by him, contrary to the intentions and purposes of the present deed, shall 'be null and have no effect. And on the other part, the said 'Isobel Drummond or M'Diarmid, and Daniel Drummond, her 'husband, for his interest, and as taking burden on himself for 'her, and they both with mutual consent and assent, bind and 'oblige themselves, and their heirs, executors, and successors, to 'make payment to the said John M'Diarmid, out of the trust-'funds, of the foresaid sum of L. 40 per annum, payable quarterly 'per advance, beginning the first quarter's payment upon the 1st 'day of May next, and that during the lifetime of the said John 'M'Diarmid, with interest of each quarterly payment from the 'time it falls due until paid, and a fifth part more of penalty in 'case of failure: And both parties to the present deed hereby 'request, and authorize and require, the trustees before mention-'ed, named by the said Angus M'Diarmid, and those assumed 'or to be assumed by them, to pay the said John M'Diarmid, 'out of the trust-funds under their charge, the foresaid annuity 'of L. 40 sterling quarterly per advance as aforesaid, and other-'wise to give effect to the present deed in all respects, and also 'to pay his funeral expenses; and the said parties hereby respec-'tively bind and oblige themselves, and their foresaids, to war-'rant these presents to each other and their foresaids, at all 'hands, and against all deadly, as law will; and they consent to 'the registration hereof in the books of Council and Session, or 'others competent, therein to remain for preservation, and that 'letters of horning on six days' charge, and all other legal 'execution necessary, shall pass hereon in form as effeirs.' The draft of this deed was sent to Drummond by his agents, who at the same time wrote to him that 'We send you the draft 'of the deed of agreement between Mr M'Diarmid and Mrs 'Drummond and you, that it may be revised by Mr M'Diarmid 'and you, and the blanks filled up. We should wish, as in all 'cases, that this draft should be revised by some man of busi-'ness on behalf of Mr M'Diarmid, that he may be perfectly 'satisfied it is drawn up in conformity to your agreement with 'him. If he has no man of business, the draft may be read over 'and explained to him by Mr Ritchie, or any other respectable 'and intelligent stranger, who has no interest in the matter, or 'by any other of the trustees.' The father had no agent, but the trustees had one. The deed, however, was not shewn to the trustees or their agent, but it was said that it was read over by Ritchie to the father, who approved of it, and suggested an

addition relative to his funeral expenses. The deed was then extended, and was executed by the parties on the 1st of April. On the following day inhibition was executed at the instance of Isobel and her husband against her father on the deed; and on the 18th it was presented to the trustees, on which occasion the following minute of what took place was made:—'Mr Drummond being present, produced to the meeting a deed entered 'into between himself and Mrs Drummond on the one part, and 'Mr John M'Diarmid on the other part, whereby the latter 'restricted his right in the succession to an annuity of L. 40 'sterling; and the meeting, after considerable deliberation, are 'unanimously of opinion, that there has been great impropriety 'on the part of Mr Drummond, in inducing Mr M'Diarmid to 'grant a deed of this description; more especially as it appears 'from the statement of Mr M'Diarmid himself, that he did not 'understand, till it has now been explained to him, the real import and consequences of that deed. And they agree, that 'every proper means should be used for setting it aside; but 'delay the further consideration of the subject till another meeting.' No copy of the deed had been delivered to the father, and after some difficulty one was procured. On the 7th of May he executed a new deed in favour of James M'Diarmid, a grandson by Hugh, with power to set aside the prior one. Accordingly an action of reduction of the deed, at the instance of the father and James M'Diarmid the grandson, was raised against Isobel and her husband, on the ground 'that 'the deed of agreement was elicited and impetrated by the defenders through gross fraud and circumvention on their part, 'and through facility on the part of the pursuer, the said John 'M'Diarmid, granter thereof, without any onerous or just cause, 'to his great hurt or enormous lesion:' And after reciting the deed of settlement by Angus, the summons set forth, 'that for 'the purpose of effecting their fraudulent scheme of depriving 'the pursuer of all management of his own affairs, and securing 'to themselves an undue share of his property and succession, 'the said Isobel M'Diarmid or Drummond, and Daniel Drummond, fraudulently misrepresented to the said pursuer the real 'terms and import of the said deed of settlement, and, by false 'and fraudulent pretences, prevailed upon him to subscribe the 'foresaid deed of agreement, whereby, without any onerous or 'just cause, and contrary to his intention at the time, he is made 'to renounce his whole right to the property conveyed to him by 'his said son, excepting to the extent of an annuity greatly

March 28. 1828.

March 28. 1828. ' inadequate for his comfortable subsistence; and the said deed ' was so elicited and impetrated from the pursuer, the said John ' M'Diarmid, who is of an extreme old age, by the said Isobel ' M'Diarmid or Drummond, his daughter, and the said ' Daniel Drummond, at a time when he, the said pursuer, was ' labouring under peculiar infirmities and affliction, and in- ' capable of understanding the same, without his being allowed ' an opportunity of advising with his other relations and friends ' upon the subject thereof. That the terms of the foresaid deed ' of agreement, obligation, &c. are in themselves grossly irra- ' tional; and the same was granted and subscribed by the pur- ' suer, the said John M'Diarmid, in entire ignorance and mis- ' apprehension of its real import and effect, to the enormous ' lesion of himself and family. That the foresaid deed of agree- ' ment contains intrinsic evidence of the fraud and circumven- ' tion by which it was obtained, and is null and void, in respect ' that while, by its form, it professes to be a mutual and one- ' rous deed, it is, in point of fact, merely gratuitous on the part ' of the pursuer, the said John M'Diarmid, who is thereby, ' without any onerous cause or consideration whatever, made to ' renounce and convey away his whole property, and to interdict ' himself from granting or subscribing any deed in relation ' thereto, restricting himself to an annuity out of his own ' property, which is inadequate for his subsistence.' The de- fenders denied the libel generally, and averred that the deed had been deliberately made and executed by the father: that under the circumstances, and particularly as the widow had in- stituted legal proceedings for setting aside Angus's deed, it was rational and proper: that it had been read over to him before execution, and fully approved of by him. But they admitted, that he was eighty-three years of age; that he was weak and infirm; that he was liable to get intoxicated; that no agent was employed on his part; that he was under the impression, that unless he made the deed, he might be reduced to poverty; that they were not under any obligation to pay to him any thing except out of his own funds; and that the amount of these, after deduction of the widow's claim, would be about L.4000. The Lord Ordinary, on the 3d February 1824, sustained ' the ' reasons of reduction, conform to the conclusion of the libel and ' amendment thereof,' and found the pursuers entitled to their expenses. The defenders having reclaimed, the Court, on the 31st May 1825, altered, and remitted to his Lordship to appoint ' a condescendence to be given in by the pursuer of the grounds

'of reduction of the agreement mentioned between John 'M'Diarmid, senior, and his daughter.' This interlocutor having been brought under review by the pursuer, the Court, before answer, ordered a condescendence; and thereafter, on the 18th May 1826, having advised the process with condescendence and answers, 'they recalled their interlocutor reclaimed against 'of 31st May 1825, and returned to the interlocutor of the Lord 'Ordinary, of date the 3d February 1824, sustaining the reasons 'of reduction; and of new reduced, improved, decerned and 'declared, conform to the conclusions of the libel and amend-'ment thereof, but found no expenses due to either party.'* March 28. 1828.

The defenders appealed.

Appellants.—The Court, without calling on the respondents to prove any thing, have decided in their favour a pure question of fact. It is true, that the defenders have admitted that the pursuer, John M'Diarmid, is an old man and frail, given to intoxication, and when in that state easily imposed on; but, on the other hand, they have averred and offered to prove, that when sober, he is perfectly able to conduct his affairs with prudence and propriety; and they deny that he was intoxicated at the time of entering into this transaction. They have also averred, and are ready to prove, that the deed was deliberately read over to, and understood and approved of by him; that it was by his instructions that the agents who prepared it were employed; and that it was seen and considered by Mr Ritchie, who, indeed, is an instrumentary witness. It is no doubt true, that the annuity is to be payable out of the trust-funds, and that one inducement to execute the deed, was to secure himself against the effects of the reduction by the widow; but this proceeded from his own suggestion, and the respondents have greatly exaggerated the amount of the funds remaining, after deduction of her claims. It is no objection, that the deed assumed the shape of an obligation and agreement. Suppose it even to be considered as a purely gratuitous donation on the father's part, it would nevertheless be good. A gift is a valid transference, and the shape of the deed matters not. Inequality in a deed creates no vice. Neither does mere facility per se. A tendency to inebriation has no more fatal effects. To vitiate a deed, the weakness of intellect must be total; and the drunkenness sufficient utterly to cloud the reason. Even a

* 4. Shaw and Dunlop, No. 373. where the Judges' opinions will be found. On the same day judgment was pronounced in favour of the widow. See 4. Shaw and Dunlop, No. 372.

March 28. 1828. mistake, unless relating ad essentialia, will not authorize annulment. The using inhibition was a precautionary measure, suggested by the old man, who knew his infirmity when exposed to designing people, and wished his children to be protected even against himself. The deed he executed was wise and considerate. He reserved to himself a provision more than sufficient, looking to his situation and habits. The rest he gave, as the trust-deed directed, to his children, and children's children, if lawfully born. The necessity of an irrevocable deed of some kind or other is proved by the present action of reduction, from which it appears that the old man has actually yielded to the very design he was most anxious to prevent, and has executed in favour of a grandchild, who they aver is illegitimate, a settlement disinheriting his own daughter.

*Respondents.**—There is no necessity of any proof being led in this case. The appellants have made admissions quite sufficient to support the judgments under appeal. They admit, that their father is eighty-three years old, frail, facile, addicted to intemperance, and, when in liquor, exposed to the importunities and practices of any persons round him. In this situation they do not deny that they found him when they came to Edinburgh; that they did not consult the trustees as to the proposed deed, nor employ the agent under the trust. All the instructions to the agents came from the appellants themselves. They did not, even in obedience to the directions given them by these agents, employ on the part of their father a man of business to revise the draft. Within twenty-four hours after they had got his signature to the deed, they executed an inhibition against him, as if he was an insolvent debtor. On the first opportunity which he had of understanding what really was the import of the deed, he expressed his objections. The deed was grossly inadequate. He is made to relinquish what could not be less than L.3500, for L.40 per annum, and that secured out of his own funds. It is idle to speak of any total danger arising from the widow's reduction. She only concluded for reduction to the extent of her own rights. If, however, the old man entertained any alarm, then the deed has been executed under mistake; and the appellants cannot avail themselves of an act which never would have had existence, had they not created or fostered the old

* The Lord Chancellor stopped the respondents' Counsel, being satisfied, from the appellant's admissions, that the judgments appealed from were well founded. The argument is taken from the respondents' Case.

man's 'fear of losing all.' The deed executed in favour of his grandson protects the interests of his descendants. James M'Diarmid is the lawful son of Hugh, and has a right to his corresponding share. Even the appellants have not been omitted. If mere inequality of bargain, or mere facility, does not afford grounds of reduction, both conjoined certainly do, and much more where deception and lesion enter as ingredients into the case. March 28. 1828.

The House of Lords 'ordered and adjudged, that the appeal 'be dismissed, and the interlocutors complained of affirmed.'

LORD CHANCELLOR.—I would submit to your Lordships, that it is not necessary that the Counsel for the respondents be further heard in this case.

The question arises on a deed executed by a person of the name of John M'Diarmid, whether that deed was obtained from him by fraud and imposition? The facts, as they appear in the printed Cases, and are stated at the Bar, are shortly these:—A man of the name of Angus M'Diarmid made a settlement of the property in question, by which that property was in certain events to be vested in John M'Diarmid,—John M'Diarmid being the father of Angus M'Diarmid. Those events occurred, and John M'Diarmid became, under this deed, entitled to property to the value probably of L. 200 or L. 300 a-year, or, taking it in a gross sum, that which was vested in him amounted to about L. 3000 or L. 4000. John M'Diarmid is admitted by the appellants to have been 'a very old and frail man;'—those are the words made use of by the appellants themselves. He appears to have been above eighty-three years of age at the time this deed was executed; and it is stated by the appellants, that, when he was labouring under the effect of liquor, he was very easily bent by the solicitations of the persons about him.

Almost immediately after this property came into the possession of John M'Diarmid, the father of the present appellant, she went to reside with him; and very shortly afterwards an agreement was drawn up by the appellants themselves, in the handwriting, I believe, of one of them, which agreement was the foundation of the present deed. When that agreement was prepared it does not appear that any legal adviser whatever was consulted on the part of this old man,—the appellants were alone with him,—and after the agreement had been so prepared, it was sent by the appellants to their own solicitors, Messrs Tod and Wright, and Messrs Tod and Wright framed a deed upon the footing of this agreement. That deed, which was thus framed, was afterwards executed by John M'Diarmid; and it does not appear that any legal adviser whatever was called in on the part of the respondent previously to the execution of this deed, although it was suggested by the solicitors on the part of the appellants, that that was the course which

March 28. 1828. ought to be taken. It does not appear that any one of the trustees of this property was informed of the existence of the deed, although the solicitors for the appellant suggested that that was the proper course. Under these circumstances, the deed which was thus executed is the subject of a very strong suspicion; but that suspicion is very much strengthened when we come to look at the deed itself.

My Lords,—In the situation in which John M'Diarmid stood, he was entitled to an income arising out of the property to the extent of upwards of L.200 a-year. In another view of the case, he was entitled to the whole property and the disposition of it. The property amounted, as far as he was interested in it, to L.3000 or L.4000. The whole of this property was conveyed away by this deed, with the reservation of L.40 a-year to John M'Diarmid for his life, without any equivalent whatever. I think, therefore, your Lordships, considering the manner in which the deed was obtained, the situation of the party executing the deed, and the dispositions of the deed itself, will view the transaction with very great suspicion.

But it is material to consider the frame of the deed itself, according to the substance of the deed. It was nothing more than a renunciation of property to which this old man was entitled. He gives up the whole of the property, reserving to himself L. 40 a-year during his life. It is nothing more than a relinquishment of property, and it ought to have appeared obviously on the face of the deed. But when you look at the deed itself, it purports to be an obligation or agreement between the parties; and the deed professes to give something as an equivalent for that renunciation of property, being entitled an obligation and agreement on the back of the deed itself. The consideration is stated to be the grant of this annuity. My Lords, there was no annuity granted; it was nothing more than a retention on the part of this individual of property to which he was entitled. There was, in point of fact, no consideration whatever; and yet on the face of the deed it purports to be for the consideration of this annuity, which the parties do not bind themselves to pay, but which is to be paid out of the trust-funds.

My Lords,—Considering the situation of the individual himself, who executed the deed,—his character,—his age,—his infirmity,—his liability to be operated upon by the suggestions of those who were about him; considering the manner in which that deed was obtained, no person having been called in to advise upon it; and considering that the suggestions which were made by the solicitors for the appellants themselves, as to the course which ought to be pursued, were disregarded; considering also the frame of the deed, it does appear to me, with all submission to your Lordships' judgment, that there was abundantly sufficient to justify the decision of the Court below, who considered this transaction as an imposition and fraud on this old man.

One of the grounds stated by the appellants for the purpose of justifying this transaction is this, that a provision was made for the widow of Angus by the original deed; that she was dissatisfied with that

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provision, and that she had instituted proceedings for the purpose of reducing the original deed; and it is supposed that the old man, being apprehensive that, if the original deed was set aside in this action by the widow, he would be deprived of all means of subsistence, and therefore that he was willing to make this species of compromise. But, my Lords, that was a gross delusion. If the widow had a right to set aside the deed, she had a right to set it aside only to the extent to which she was herself interested, and the rest of the deed must remain; and, as one of the learned Judges stated in the Court below, that forms an additional reason for vacating this transaction, as having been founded in delusion on the part of this old man. I think your Lordships will be of opinion that the Court below were fully justified in the opinion they formed of this transaction, that there is sufficient in the case, as it now appears, to justify the Court in setting aside this deed, under the circumstances under which it was obtained.

My Lords,—It may be satisfactory to your Lordships to know, that when this case was opened by the appellant's counsel, a noble and learned Lord, who held the office to which I have the honour to succeed, was present, and paid great attention to every part of it. I have had some conversation with him upon the subject, and he has authorized me to state, that he perfectly concurs in the view I have stated to your Lordships. Under these circumstances, I conceive your Lordships will be of opinion that this judgment ought to be affirmed.

Appellant's Authorities.—Smith, Dec. 23. 1697, (4955.); Gordon, Feb. 7. 1729, (4956.); Maitland, Feb. 13. 1729, (4956. and Craigie and Stewart's Appeal Cases, April 20. 1732, p. 73.); Swintoun, Dec. 10. 1679, (4962.); Mackie, Nov. 24. 1752, (4963.); Scott, Nov. 17. 1789, (4964.); Ersk. Inst. 4. 1. 27.

Respondents' Authorities.—Ersk. 4. 1. 27.; Gordon, April 28. 1730, (Craigie and Stewart, p. 47.); Murray, Jan. 21. 1826, (4. Shaw and Dunlop, 374.); M'Neil, May 26. 1826, (4. Shaw and Dunlop, 620. and 2. Shaw's Appeal Cases, No. 29.)

J. HYNDMAN—MONCREIFF, WEBSTER and THOMSON,—Solicitors.

No. 4.

ANNA MARIA GRAHAM or TEMPLER, and Lady MONTGOMERIE, Appellants.—*Adam—Wilson.*

The Reverend GEORGE HENRY TEMPLER, and Others, Respondents.—*Sugden—Keay.*

Trust—Clause—Succession.—A party having conveyed his estate to trustees, for behoof of a contingent heir, whom failing, other substitutes, with a general assignation of rents for behoof of the contingent heir;—Held, (affirming the judgment of the Court of Session), That the heirs-at-law had no claim to the rents arising between the death of the party and the succession of the heir.

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2D DIVISION.
Lord M'Kenzie.

THOMAS GRAHAM went to India in 1769, where, in 1783, he married Miss Paul, and settled L.10,000 upon himself and her, and the longest liver, in liferent, and the fee among the children of the marriage. In 1802 he acquired the estate of Kinross, in Scotland, under a transaction with the natural son of his brother George, the former proprietor.* He had previously bought the estate of Burleigh in the same county. Of his marriage he had two daughters, Anna Maria, who married the Rev. Henry George Templer, vicar of Shapwick, in Somersetshire, (on which occasion she received from her father L.5000), and Helen, who at a future period married Sir James Montgomerie of Stanhope. In 1808, Mr Graham, immediately before his departure from India, executed a trust-deed in these words:—'Know all men by these presents, that I, Thomas 'Graham, a native of Kinross, in that part of the United King-'dom of Great Britain called Scotland, Esq. now acting Presi-'dent of the Board of Revenue at Calcutta, in Bengal, being 'about to embark on shipboard for Scotland, and now without 'the aid of persons learned in the laws of Scotland to assist me 'in making a disposition of my lands and other property in the 'manner I am now most desirous, and different from what I 'have heretofore done, according to the strict rules of the laws of 'Scotland, do hereby, for certain causes, and for the better dis-'posing of all the property, landed, or real and heritable, where-'of I am seized, possessed of, and entitled to in Scotland, Eng-'land, India, or elsewhere, and also of all and every my perso-'nal, moveable, and chattel interests, estate, and effects whatso-'ever, in the manner herein after mentioned, and in consideration 'of the confidence which I repose in the persons herein after 'named, whom I appoint as trustees for the ends, uses, and pur-'poses herein after-mentioned, give, grant, dispone, assign and 'make over, to and in favour of myself during my lifetime, 'and at my death to and in favour of my wife, Anne Graham, 'the Rev. George Henry Templer, vicar of Shapwick,' (and certain other trustees), 'heritably, according to the respective 'qualities of my said estates, real, or landed and personal, upon, 'and to and for the uses, trusts, intents and purposes following: '—All messuages, lands,' &c. and his whole 'personal estate 'and effects, and chattels, of what nature or kind soever,' belonging to him at the time of his death; 'and without prejudice

* See 1. Shaw's Appeal Cases, p. 365.

'to the said generality of these presents, all and sundry my lands April 1. 1828.
'and estates herein after-mentioned; that is to say, All and Whole
'the lands and barony of Burleigh, &c. all lying in the barony
'of Burleigh and sheriffdom of Kinross; and sicklike, All and
'Whole the lands and barony of Kinross and Lochleven, &c.
'together with all right, title,' &c.; 'declaring always, and it is
'hereby expressly provided and declared, that my aforesaid es-
'tates, real or landed, and heritable and personal, are conveyed
'by these presents to my aforesaid trustees in manner aforesaid,
'upon the trusts, and to and for the uses, intents, and purposes
'following:'—First, The payment of such an annuity to his wife, as, with the produce of the L.10,000 settled on her by their marriage-contract, should yield a free annuity of L.2000. Second, A sum of L.5000 to his daughter Helen, chargeable on his real estate alone, unless deficient. And, third, That subject to these burdens the trustees should 'denude themselves of, and convey
'all and every my aforesaid real or landed and heritable estates
'hereby conveyed, but charged and chargeable with the annuity
'to my said wife Anne as aforesaid, and the said sum of L.5000
'to my daughter Helen, in favour of, and unto and to the use of
'the first son of my body lawfully to be begotten, and of the
'heirs-male of the body of such first son lawfully issuing;' (whom failing, then his other sons in their order, and their heirs-male respectively); 'and for default of such issue, then unto the first
'son of either of my said daughters, lawfully begotten, who shall
'first attain the age of twenty-one years, his heirs and assigns,
'for ever. But in case my said daughters shall both of them
'die, and have no such son of either of them my said daugh-
'ters lawfully begotten, who shall attain his age of twenty-one
'years, then in trust to denude themselves of, and convey all and
'singular the aforesaid real estate and lands, barony and appur-
'tenances, of Kinross and Lochleven, formerly the estate and
'property of my deceased brother George Graham, to my
'nephew, George Graham, Esq. and his heirs and assigns for
'ever, and to denude themselves of, and convey all and singular
'the aforesaid real estate and lands of Burleigh, purchased by
'me, unto my nephew Robert Graham, a senior merchant in the
'service of the United Company of Merchants of England
'trading to the East Indies, his heirs and assigns, for ever; and
'also in trust, to sell all the rest, residue, and remainder of all
'my aforesaid real or landed estate whatsoever, or wheresoever
'lying and being, and to pay, assign and transfer the proceeds
'and produce of the said sales of the said rest and residue of my

April 1. 1828. 'said real or landed estates, together with all the rest and residue 'of my personal estate and effects, equally, share and share alike, 'as tenants in common and not as joint tenants, between my 'said wife, Anne Graham, and my said daughters, Anna 'Maria Templer and Helen Graham, for their own sole and 'separate use and benefit, notwithstanding their or either of their 'present or future coverture, without being subject to the debts, 'controul, forfeiture, disposal or engagements of their or either 'of their husbands, present or future, and subject to the appoint-'ment of them, the said Anne Grahame, Anna Maria Templer 'and Helen Graham, from time to time, notwithstanding their 'or either of their covertures, of their said respective shares, by 'any writing or writings by them respectively signed, in the pre-'sence of one or more credible and attesting witnesses.' Then followed various other provisions immaterial to the present question; procuratory of resignation; revocation of previous dispositions; reservation of power to revoke; clause of registration and precept of sasine; and particularly the following clause:—'And 'I do hereby assign and dispone to myself, and to my said trus-'tees, for the use and behoof of my heirs and substitutes before-'mentioned, in the order aforesaid, all and sundry charters, pro-'curatories of resignation, precepts and instruments of sasine, 'and other writs and securities of the lands and others before 'conveyed; and also the whole rents, feu-duties, mails, profits 'and casualties thereto belonging, and tacks, if any be subsisting 'at the time, for now and in all time coming.'

Mr Graham came to Great Britain, and resided partly in London, (where he had bought a house), and partly on his estates in Scotland, which he had increased by the purchase of Bowhouse and Balgeddie. Thereafter his daughter Helen married Sir James Montgomerie, on which occasion he secured to her the L.5000 provided by the above deed. He died in London on 28th July 1819, leaving no other issue alive than his two daughters, Mrs Templar and Lady Montgomerie. The trustees accepted, and took possession of the estates. In 1820 the widow died. A question then arose as to the right to the rents which had become due since the death of Mr Graham, and to become due till the period when the trustees might be obliged to denude. Mrs Templer had only a daughter, and at this time Lady Montgomerie had no son. To try the question, they raised an action against the trustees, stating, 'That by the failure of issue-'male of the body of the said Thomas Graham, and as there are 'yet no male issue of the bodies of the pursuers, the said Anna

'Maria Templer and Dame Helen Montgomerie, who, under 'the destination in the said trust-deed, are entitled, or have a 'right to take up the succession to the said lands and estates, or 'to intromit with the rents, feu-duties, and casualties thereof, 'and that nothing is given by the trust-deed to the heirs called 'to the succession but the lands, when their right shall open to 'the same, the pursuers, the said Anna Maria Templer and 'Dame Helen Montgomerie, who are not only the heirs-por- 'tioners at law of the said Thomas Graham their father, but 'entitled by said trust-deed and settlement to his whole rents, 'feu-duties, and casualties of the lands and estates libelled, and 'the issues and profits of all other real estates of which he may 'have died possessed, and that from and after the period of the 'said Thomas Graham's death, until an heir shall appear en- 'titled to take up the succession thereto, under the destination 'contained in the trust-disposition before-libelled. That al- 'though it was evidently the intention of the said Thomas 'Graham that the pursuers, his heirs-at law, should enjoy the 'rents of all his real estates in Scotland and elsewhere, until an 'heir should appear under his trust-settlement entitled to take 'up the succession, he having made no special appropriation 'thereof during such interval, and carried that intention into 'execution by the trust-deed before-libelled, drawn up at his 'sight, and under his special direction, by an English con- 'veyancer, and executed in India, where the law of England 'prevails, and by which law the pursuers have an undoubted 'right to the whole rents of their father's estates during the 'interval aforesaid, as unappropriated funds. And although 'the pursuers, in consequence of said right, have divers and 'sundry times desired and requested the said trustees to 'give up and surrender the said rents to the pursuers, and to 'account to them for their intromissions therewith since the 'death of the said Thomas Graham, they nevertheless refuse, at 'least postpone and delay, so to do, unless compelled.' They therefore concluded, that the pursuers should be declared to have right to the rents, &c. of the baronies of Burleigh, Kinross, and all the other heritages, from the death of their father, until an heir should appear entitled to take up the succession to the estates, to be applied to their own proper use and benefit, and all the arrears thereof, subject to the payment of such burdens as might affect the said lands during the pursuers' possession of the rents; and they also concluded for the bygone and future rents, &c.

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The trustees stated in defence, that, by the law of Scotland,

April 1. 1828. the rents of lands, and increase from other property, are considered as accessories to the respective properties which yield them; and therefore the rents and profits concluded for must all be considered as falling under the trust for behoof of the heirs called by the trust-deed, in the same way as the estates themselves, more especially as there was an express clause assigning to them the rents for behoof of the heir.

The Lord Ordinary decerned in terms of the conclusions of the libel, and communicated this opinion in a note:—'The Lord 'Ordinary does not conceive the case to depend on English law: 'but he does not see sufficient ground in Scotch law for hold- 'ing that the rents must be conveyed to the son of the testator's 'daughters first attaining majority, &c. along with the land. 'The Lord Ordinary is not able to consider past rents as acces- 'sories of lands. They are the price of the use of the land in 'past years, and no authority is referred to, establishing, that 'direction to convey land, at a time subsequent, implies that 'prior rents as accessories are to be conveyed with it. Now, 'in this case, the direction is such as necessarily to imply, that 'the conveyance of the land shall not be made till after an event 'shall have happened, *i. e.* after a time shall have passed. And 'there is no provision that the daughter's son, &c. shall have 'the intermediate rents, or that in the intermediate time it shall 'be managed for his profit, but merely that the land shall be 'held by the trustees for the purposes of the trust; and as one 'purpose, that, after a certain event, the land (not the rents) shall 'be conveyed to the daughter's son first attaining majority, &c. 'The Lord Ordinary has great doubts, whether, if the truster 'had been reminded that such rents might accumulate, and asked 'whether he desired that the daughter's son, &c. should have 'conveyed over to him, along with the land, such accumulated 'fund, he would not have said, "No. If money is to be 'gathered, I shall dispose of that otherwise." At any rate, he 'has not directed this, nor does it appear to be necessarily im- 'plied in what he has directed.'

In the meanwhile Lady Montgomerie had two sons, and one of the substitutes having become bankrupt, and the trustees having reclaimed, the Court, on advising petition and answers, appointed intimation of the process to be made to such of the defenders of full age who had not yet appeared, and to the guardians of such of them as were under age, and also to the assignees under the commission of bankruptcy against George Edward Graham, Esq.; and thereafter, the order having been complied with, and a curator ad litem appointed for Lady

Montgomerie's two sons, the Court, on the 14th February 1826, on considering memorials, altered the interlocutors complained of, and assoilzied the defenders; but found, that the expenses of both parties in trying the question must be paid out of the trust-funds.* April 1. 1828.

† *Lord Glenlee.*—This case is certainly not in the same situation as when it was before us on the petition and answers. There is a great deal of new matter stated for the defenders. One thing which was not formerly stated to us, at least not so strongly, and which is of great importance, is not only the terms of the precept of sasine, but the terms of the assignation of the rents future and to come. When the question was before the Lord Ordinary, and formerly before us, it was understood to stand entirely in the manner stated in the cases from the English law; that in the trust-deed there were no directions as to the intervening rents; that the trustees claimed these as accessories of the estates themselves, for the use of those entitled to those estates, and that they would thus go to a person whose right only emerged at a distance of time; that there was no disposition of rents between the death of the testator and the coming of age of the son of the daughters, nor any due direction as to whom the trustees held the estate for during that time; and that the only purpose expressed by the testator was, that on that event the estate should go to the son when he comes of age; that the rents, no doubt, are accessories to the estate, but that it is absurd to say, that a person, whose right only emerges to-day, carries all the bygone rents; and that you are not to superinduce an intention to the will of the testator, which he might have had if he had thought of the matter. But it is quite a different question when you find the testator using words indicating this intention, that these rents should be held for a particular person. There is an express declaration that the rights to the estates are to be held 'for the 'use and behoof of my heirs and substitutes before-mentioned 'in the order aforesaid; and also, the whole rents, feu-duties, 'mailla, casualties, and profits thereto belonging, and tacks, if 'any be subsisting at the time, for now, and in all time coming.' I cannot hold that this is not a declaration that the rents of the estate are to be held by the trustees for behoof of the persons who, in the order mentioned in the deed, are to take the estate. As to the English law, I cannot pretend to say that I have any

* 4. Shaw and Dunlop, No. 303.

† These are the opinions laid before the House of Lords.

April 1. 1828. knowledge of the matter; but from the quotations made in the papers, I rather think the English seem to have a notion that accessories cannot exist till there is a person entitled to uplift them; but according to our law, we may give effect to a trust for behoof of a certain set of persons under a general description, although the precise individual may not be ascertained at the time, and the trustees may hold for him till he cast up; and therefore it appears to me, that the testator having used this expression, that these rents should be held for behoof, no doubt of an indefinite person, as to whose existence there was an uncertainty, but still for behoof of a certain set of persons, such a trust is competent by the law of Scotland, and that these rents must remain with the trustees in the mean time, and be afterwards made over to the person who shall be entitled to the estate.

Lord Pitmilly.—If we had been forced to decide this case as it stood formerly before us, I will acknowledge that I would have been disposed to concur in the interlocutor pronounced by the Lord Ordinary; but I am glad that it has been more fully investigated; and upon a more full consideration of the case, and of the new matter that has been brought before us, I have come to form the same opinion with that just delivered. The pursuers rest much on the idea, that these rents were not appropriated by the testator. It is not denied, and indeed could not be denied, that they were conveyed. They were so by the very nature of the conveyance; but there is, besides, an express assignation of them. But it is said that they were not appropriated; and therefore fall to the pursuers, either as nearest of kin, or as residuary legatees. The effect of their being conveyed would go a certain length in deciding the question. But we cannot lay out of view, that the rents were conveyed in a precise manner, which was not before us formerly, at least not so fully. This assignation is, I think, sufficient to decide the question. The rents are conveyed for the 'use and behoof of my heirs and 'substitutes before-mentioned, in the order aforesaid.' Where that is the nature of the conveyance, the case is completely distinguished from the case of Souter, mentioned in the papers. There the whole subjects had been conveyed to the trustees to pay debts and funeral expenses, and the residue to an only son who had gone abroad; but in the event of the son not being heard of, there were certain legacies left. These were paid, and a surplus remained which the trustees claimed for themselves. That claim, however, was disregarded, and the next of kin was preferred to the surplus unappropriated. But this is a totally

different case, for here the rents are conveyed for the use of the substitutes. Does not this take away the claim as heirs-at-law, which is the strongest ground of the pursuers' claim, because these rents are conveyed for the use of the substitutes in their order? The claim of the pursuers must rest therefore on the doctrine of their being the residuary legatees, and that these rents fall under the clause of the rest, residue, and remainder of the testator's estate, heritable and personal, provided to them. But when we look at the terms of the conveyance of the estate, the only meaning we can put on it is just a conveyance of the estate with the future rents, after they have paid the burden of the provision to the widow, and the L. 5000 to Lady Montgomerie. It is admitted, that if Mr Graham had left a son, the subject conveyed would have included these very rents. Now, whatever was the subject conveyed to the son, the same was conveyed to the substitutes. For there is no repetition of the conveyance; it is just conveyed 'in default' of the son. There is no new conveyance, and as to the son, it was just a conveyance of the estate with these rents; and, besides, we cannot hold, that there is one case in which they are to be held as appropriated, and another in which they are to be held as not appropriated. They were in all cases in the same situation. No doubt, the right to these rents was contingent; but it is plain, that the amount of the estate is not to be affected by the contingency of who is to get it. The amount is one thing, and whether it should belong to the son of the one or the other is another thing; and, therefore, upon the whole, and particularly from the express terms of the trust-deed, I cannot adhere to the Lord Ordinary's interlocutor. April 1. 1828.

Lord Alloway.—None of your Lordships can regret the course we took when the case was last before us: At that time it struck the Court that the parties were nearly the same. The trustees, Sir James Montgomerie and Mr Templer, were pursuers so far as their wives were concerned, and as trustees they had little or no interest in the case; and therefore you properly ordered parties to be called who had an adverse interest. These parties have not appeared; but now the question is fairly debated, and I very much mistake if it will not be followed by an unanimous judgment, different from what would have been pronounced when it was last before us. At that time I considered it a case of such importance, that I stated the doubts which occurred to me for the use of the Bar. I am now satisfied on all the points, and that the case is now ready for decision.

The case for the pursuers is very well argued; but it is admit-

April 1. 1828. ted, at least as far as not dwelling very much on the point is an admission, that this question must be regulated by the law of Scotland. I think we ought not to admit the English authorities at all. It is a Scotch heritable estate, and if there be any contrast between the law of England and Scotland, it is in the rights of landed estates. To a Scotch lawyer the English law on this subject is totally unintelligible. But whether the English authorities quoted are right or wrong, how can they affect this question, where a Scotch estate has been effectually vested? And I entertain no doubt that it has been vested, not only for the son of the testator, if there had been a son, but also for the conditional heirs, who are to be the first son of the daughters who arrives at majority, and failing that, the two nephews, when the estates divide. The pursuers have fairly met this view of the question. But they argue, that they have the right to these rents because they are the heirs of line; and if the testator has omitted to appropriate any thing, they are entitled to it. The answer to this I shall state immediately. But, in the second place, they maintain, that if they can take nothing as heirs of line, they will take as residuary legatees. But this last plea is altogether out of the question. For, suppose any thing had been omitted, these lands were not to go to the heir alioqui successurus. The estate of Kinross was settled by Thomas Graham's brother George, on the heir-male of Thomas, and failing that on his nephews. Now, suppose Thomas had not conveyed all the right which was in the person of George, (which he was entitled to do), there would be no doubt that the heir alioqui successurus was the heir under the old investiture. It also appears that Thomas, when he succeeded, and had a power of altering the destination, seems to have adopted very nearly the same idea. He prefers the heir-male to the heirs-female; and therefore he settles the estates on the heirs-male of his own body, and particularly, you will observe, on their heirs-male. If he had left a son, it is impossible his daughters could have taken. They were not the heirs. And then in the second destination he calls the heirs-male of the daughters; the first heir-male who should attain the age of twenty-one,—thus following a male succession in preference to a female. The third destination is, that then the estates should go to his nephews. There is no doubt that the estate of Burleigh stands in a different situation, not having been settled before he acquired it, and therefore, if he had omitted any thing as to it, they would be entitled to take it up. But according to my view, every thing he held was positively settled

by the trust-deed, and the daughters absolutely excluded by that deed. But when the succession opened by failure of the grandsons, it was only then the ladies could have any succession at all. Upon that ground it is utterly impossible that they can have claim to any part of the residue till that event. I agree with what has been stated by Lord Glenlee and Lord Pitmilly,—but I go a great deal farther; for, according to my view of the case, though I think with them that the assignation of the rents for behoof of the heirs-substitute is sufficient to put an end to the question, I maintain, as a substantive proposition, that when an estate is conveyed to trustees for behoof of another, the conveyance carries the whole rents, casualties, wood, and quarries, in the same manner as the estate itself. My opinion would have been, that the rents were accessories. I take this simple view of it:—Suppose the institute had succeeded, is it possible to doubt that the whole rents would have belonged to him? No doubt, a person settling an estate by a trust may give away the rents, and may give such directions to apply them as he thinks proper; and if the testator had given any directions here, we must have given effect to them. But the instructions here are inconsistent with the idea of the plea maintained by the pursuers; as heirs-male are alone called, and they can have no claim until the failure of the nephews. I would therefore have held the case as clear, even if the clause had not been so express as to the assignation of the rents. The pursuers have quoted all the cases which bear on the question. But is it possible to apply the case of Souter to this question? In that case, a woman having L.550, disposed of L. 400 in the event of her son not appearing within a year after her death. The trustees, on the lapse of that time, without the son being heard of, disposed of the L. 400, and the only question was, Whether the surplus of the L.150 belonged to the trustees themselves, or to the heir-at-law? There was no ground to shew the testator's inclination to give it to the trustees, and none of the legatees could claim it, and therefore the next of kin took it. But here the testator has specially excluded his daughters till the failure of his grandsons. It is impossible, therefore, to apply that case. The other cases quoted by the pursuers, I think, illustrate the argument on the other side; such cases as those with regard to cotton mills, and as to what is to be held as accessories to them. No doubt, with regard to a thrashing mill, the machinery is a moveable subject, except what is inedificatum. The question as to a cotton mill is to be decided on the same principle. In one of the cases, a person had an heritable security over a cotton mill. The question,

April 1, 1828.

April 1. 1828. therefore, was, What was the nature of a cotton mill? It must be a fair working cotton mill; and when a security is given, it must necessarily cover every thing to make it effectual. These questions depend on the principle of heritable and moveable. But can these questions enter into a case like the present? They might enter in this way:—Suppose these trustees had a power of granting leases, and they had granted a lease of a cotton mill on the one estate, and a common mill on the other, the heirs-substitutes succeeding would have taken as accessories those parts of the machinery of the mills, which, in a question with a tenant, are held as belonging to the landlord. But these questions do not enter into discussion here. I therefore concur in the opinions delivered.

Lord Justice-Clerk.—As I agree entirely with the opinions that have been delivered, I do not intend to enter into the question at any length, but I must express my satisfaction that we took the course we did; for though this is an amicable suit, we adopted a course to enable us to have it argued fully. The case being now fairly before us, the question is, Whether we can authorize the trustees to pay over these rents to the pursuers. On the fullest consideration of the case, I am entirely of opinion that we cannot adhere to the interlocutor of the Lord Ordinary. It certainly is true, that this clause as to the assignation to the rents, on which your Lordships have founded so much, was not so strongly brought before us formerly. It is impossible, upon seeing that clause, to doubt that the question here raised by the pursuers does not apply to this case, that the testator must be held as having disposed of part of his estate, and not of the rest. If that had been the case, you would have looked to the cases quoted, and especially that of Souter. But is that the case here? We have an express declaration on the face of the deed, that the trustees are to hold these estates for behoof of the substitute heirs; and there is an assignation of the rents, not for behoof of the heirs of line, or the residuary legatees, but for the heirs mentioned in the deed. It is quite impossible to doubt that these trustees must do their duty. They must hold every advantage derived from the estate, as much as the estate itself, for the behoof of the first son of the daughters who shall attain the age of 21; and every thing for him as the favoured heir of the testator, the same as if it had been a son of the testator who succeeded. The same question, to be sure, could not have arisen with him, as the trustees must have denuded at once; but the same estate is conveyed to the substitute heirs as to the son. We cannot cut and carve on this deed, though these ladies stand as near to

the testator, and though it is the son of one of them who is to succeed. There is here no question of aliment. The cases quoted would deserve consideration, especially the case of Somerville. But the demand here made is, that the trustees shall be authorized to pay over to the pursuers the whole rents. We cannot adhere to the interlocutor of the Lord Ordinary; and I am convinced that he must have pronounced the interlocutor from the case being presented to him in the same view in which it was presented to us formerly. This is one of the cases, however, in which I think that we should find that the expenses of the question should be paid out of the trust-funds. April 1. 1828.

Lord Alloway.—We certainly ought to find that the expenses should be paid out of the trust-funds.

The pursuers appealed.

Appellants.—The lands were conveyed to the trustees, to be held for behoof of the son of the one or other of the appellants who should first attain majority, whom failing, the other substitutes. It is clear, therefore, that they do not hold the lands for any particular person. If the sons die before attaining majority, then the estates go to the substitutes; and, on the other hand, if one or other of them reach majority, then, but not till then, the estates will vest in his person. If they had vested in any party immediately, then, no doubt, the rents would as accessories have accrued to him. But that is not the case; and the only other way in which a right to them could be given, was by special conveyance. But there is no special conveyance to any part of the rents, and consequently they must belong to the appellants as the heirs-at-law of their father. It is true that there is a general clause conveying the rents to the trustees; but this is merely the usual one of style, and cannot be considered as indicative of the intention of the maker of the deed. Besides, it is plain, that if all the substitutes fail, the rents must accrue to the appellants as residuary legatees.

*Respondents.**—This case must be treated as a Scotch case, and be governed by the Scotch law. Mr Graham has most unequivocally expressed his will, that the rents and profits of his heritable property should be drawn and held by the trustees for the use and benefit of the heirs and substitutes, to whom ultimately these estates are destined. If Mr Graham had had a son, the

* The Lord Chancellor did not require the respondents' Counsel to proceed, as he considered the assignation clause to settle the question against the appellants. The argument is taken from the respondents' Case.

April 1. 1828. trustees would have held the rents for him as first called; heirs-male failing, they hold for the next party called, viz. the first son of either daughter attaining majority; then for the nephews; and, lastly, as to the residue, for the daughters. But this appropriation is fatal to the appellants' present plea. Even, however, if this clause had not occurred in the deed, the rest of the deed would, by the ordinary rules of law, and in conformity to the intention of the testator, have belonged to the trustees for the benefit of the heirs and substitutes called by the deed. The maxim, accessorium sequitur principale, regulates this question. Whatever was given to the trustees by the trust-deed, was by the same deed, when the primary purpose of the settlement was accomplished, given to the son of the truster. They could no more have withheld the rents from him, than the solum which produced these rents. But whatever had been given to the son was, on his failure, directed to be given to the daughter's son. There is, therefore, nothing unappropriated that can fall to the appellants as heirs-at-law; and as the rents in question do not enter into the 'residue,' the rents cannot be taken up by the appellants as residuary legatees.

The House of Lords 'ordered and adjudged, that the appeal 'be dismissed, and the interlocutors therein complained of affirmed; and further, that the expenses of both parties in this 'cause be paid out of the trust-funds in dispute.'

Appellants' Authorities.—Hyslop, Jan. 18. 1811, (F. C.); Arkwright, Dec. 3. 1819, (F. C.); Niven, March 6. 1823, (2. Shaw and Dunlop, No. 250.); Souter, Jan. 22. 1801, (No. 2. Ap. Imp. Will); Earl of Stair, May 24. 1826, and June 19. 1827, (ante, Vol. II. Nos. 31. and 54.)

Respondents' Authority.—Gillespie, Dec. 7. 1802; (No. 2. Ap. Acc. Seq. Prin.)

MOORE—SPOTTISWOODE and ROBERTSON,—Solicitors.

No. 5.

JOHN WILSON and Others, Appellants.—*Shadwell—Adam.*

Sir WILLIAM FRANCIS ELIOTT of Stobs and Wells, Respondent.—*Spankie—Brougham.*

Et e contra.

Sale—Entail—Land-tax—Fraud.—Part of an entailed estate, which was greatly more than sufficient, having been sold under the 42. Geo. III. c. 116. for redemption of the land-tax; and no evidence having been taken that it could not have been divided, so that an adequate part only might have been sold; or that the sale of the whole would have been more eligible and advantageous for the estate and heirs-substitutes than the sale of a part only;—Held, in an action at the instance of an heir-substi-

tute, (affirming the judgment of the Court of Session, but superseding their findings),—1. That the sale was not effectual; and, 2. That a singular successor infeft, and whose author was also infeft, could not be affected by the fraud of his author.

May 2. 1828.

1st Division.
Lord Eldin.

By the 61st section of the 42. Geo. III. c. 116. it is enacted, 'That where any heir of entail in possession of an entailed estate 'in Scotland, or his or her tutor or tutors, or where he or she 'is an idiot or lunatic, his or her curator or curators mean to 'sell part of the said estate to purchase the land-tax of the estate 'in terms of this Act, it shall be competent and requisite for 'him, her, or them, to apply by petition to the Court of Session, 'stating the amount of the land-tax payable out of the said 'estate, what part of the estate it is proposed to sell, and the rent 'or annual value of that part of the estate; and praying the Court, 'upon the allegations on these points being proved to the satisfaction of the Court, and it being shewn that the sale of the part 'of the estate proposed to be sold will not materially injure the 'residue of the estate remaining unsold, and that the part so 'proposed to be sold is proper (considering all circumstances) 'to be sold for the purpose aforesaid, to authorize such sale to 'proceed in manner herein after enacted; and the Judges of the 'said Court are hereby authorized and required to order such 'petitions to be intimated upon the walls of the Outer and Inner-'House of the said Court, in common form, for ten sederunt 'days, and also to be advertised weekly for two weeks successively in the Edinburgh Gazette; which intimation and advertisement shall be a valid and effectual intimation, advertisement, 'and service, to all intents and purposes, as much as if the said 'petitions had been personally intimated to or served upon all 'persons having, or pretending to have, any interest with regard 'to the said estate, as substitute heirs of entail, creditors on the 'said estate, or in any other way or character whatever; and 'such intimation being duly made, the Court shall proceed summarily in the matter, and shall authorize the sale of that part 'of the estate which the petitioner or petitioners are willing to 'sell, which the Court thinks ought to be sold for the purpose 'above-mentioned, and against the sale of which no sufficient 'reason is stated by any person having interest; and the extract 'of the decree of the Court authorizing the sale, shall be sufficient 'authority to the commissioners acting under this Act to carry 'on the sale in the manner herein directed.' Again, by the 63d section, it is declared, 'That if any farm, lands, or tene-'ments, usually possessed together, shall be proposed to be sold

May 2. 1828. 'under the provisions of this Act, which shall be more than sufficient for that purpose, and it shall appear to the Court of Session, either from the detached situation of such farm, lands, or tenements, or from any other circumstances, that such farm, lands, or tenements cannot be divided, in order that an adequate part thereof may be sold without loss to the parties interested, or that the sale of the whole of such farm, lands, or tenements, would be more eligible and advantageous to the said entailed estate, and to the successive substitute heirs of entail in their order, it shall be competent and lawful for the said Court of Session, in like manner as it is authorized to proceed in other cases by this Act, (due notice having been given to the next substitute heir of entail, being of lawful age and resident within Great Britain, of such proposal to sell and dispose of such farm, lands, or tenements), to direct and authorize the sale of the whole of such farm, lands, or tenements; and the surplus money, after purchasing stock sufficient to redeem such land-tax, and paying and discharging the costs and expenses attending the sale thereof, shall, with the interest and annual produce thereof, be applied and disposed of under the direction and with the approbation of the said Court, in the same manner as herein is directed with respect to the eventual surplus arising from sales, when no more has been exposed to sale than is judged adequate for the redemption of such land-tax.' By the 65th section it is enacted, 'That where any such sale shall be authorized by the Court of Session, the same shall be carried on by public auction, at such time and on such notices as the said Court shall from time to time direct; and further, that previous to any sale to be made in the terms and by virtue of the powers required and given by this Act, the Court of Session shall cause articles of sale to be drawn up in the usual forms required by the law of Scotland for making such sale effectual, and whereby the purchaser shall be taken bound to pay the price to a trustee,' &c. And, 'That the said trustee, upon receipt of the said price or prices, shall be forthwith bound to pay the said money into the Bank of England, and to be there placed to account of the Commissioners for the Reduction of the National Debt, to be by them applied in the manner and for the purposes directed and specified by this Act, and the receipt of the cashier or cashiers of the Bank shall be a full and sufficient discharge to the said trustee, and to the said purchaser or purchasers, for the sum or sums of money so agreed to be paid by him, her, or them, in

'manner aforesaid; and which purchaser or purchasers, upon 'payment of the sum or sums by the said trustee into the Bank 'of England as aforesaid, shall be entitled to demand and obtain 'from the said heir of entail, or other person or persons in whose 'name, or at whose instance, or for whose behoof the said sale 'or sales is or are carried on, such disposition, conveyance, or 'other title to the subjects so sold, containing all usual and ne- 'cessary clauses for rendering complete the right to the same, 'in favour of the said purchaser or purchasers, under the direc- 'tion of the said Court.' May 2. 1828.

In May 1803 the late Sir William Eliott, Bart. the proprietor of the entailed estate of Stobs, presented a petition to the Court of Session, setting forth, that 'he was heir of entail in possession 'of the estate of Stobs, lying in the county of Roxburgh, and 'he intended, under the authority of the Act of Parliament pass- 'ed in the 42d year of his present Majesty, cap. 116. entituled 'an Act for consolidating, &c. to sell a certain part or parts of 'the said entailed estate, and to apply the price to the redemp- 'tion of the land-tax payable therefrom; that the amount of the 'land-tax of the said estate would be specified in the course of 'the proceedings under the present application; and that the 'most eligible part of the estate for that purpose appeared to be 'the farm of Hallrule, Hallrule-mill, and Town o' Rule, pos- 'sessed by George Currie at the yearly rent of L.230 sterling; 'that the sale of the above-mentioned parts of the estate would 'not materially injure the residue of the estate remaining unsold; 'and that the part so proposed to be sold was proper (con- 'sidering all circumstances) to be sold for the purposes aforesaid.' The petition prayed their Lordships 'to appoint this petition 'to be intimated in the usual manner; to allow the petitioner 'a proof of the facts herein set forth; and upon the same being 'proved, to authorize the sale of the said lands, directing the 'prices to be applied in terms of the said Act of Parliament.'

The Court, on the 24th May 1803, appointed the petition 'to be intimated in terms of the statutes; and when these inti- 'mations are made and reported, they will resume considera- 'tion of the petition.' On the same day, and on the 31st May, intimation was made in the Edinburgh Gazette, on the walls of the Inner and Outer-House, and in the Minute-book. The report of the intimation stated, that the pursuer proceeded under the 61st section of the statute; and his agent certified, that the intimation on the walls had been done as directed by the same section. It was also alleged, (in the course of the present suit),

May 2. 1822. that at the same time Sir William had made intimation to his sister, Mrs Guy, the next heir of entail of full age, and resident in Great Britain, (his own children, the immediate substitutes, being all in pupillarity), to which he had received this answer:—'Lynford-Hall, Norfolk, June 22. 1808. Sir,—I received your 'letter of the 4th, intimating to me, that you intended to make 'application for leave to sell the farm of Town of Rule, and 'Hallrule, for redeeming the land-tax of the entailed estate of 'Stobs, and for other purposes of the Act of Parliament. I am,' &c. The letter to which this was an answer, was not produced, and it did not appear that any notice had been given as to Hallrule Mill. Of the same date, a minute was lodged, stating, 'that since the petition was given in, the petitioner had obtained 'a certificate from the proper officer, of the amount of the petitioner's land-tax, which is thereby ascertained to be L.56. 8s. '$7\frac{6}{12}$d.; and that the application had also been intimated upon 'the walls of the Outer and Inner-House of the Court, in common form, for ten sederunt days, conform to certificate subjoined to the petition; and also intimated or advertised weekly, 'for two weeks successively, in the Edinburgh Gazette, as appears from copies of that publication, of dates 24th and 31st May 'last, both herewith produced.' He therefore craved, that their Lordships would sustain the notices, and allow a proof in common form. The Court thereupon 'having resumed consideration of this petition, with the intimations thereof, in terms of 'their former deliverance, and having advised the same with the 'minute this day given in for the petitioner, and no objection 'being made by any party having interest, they allow the petitioner to prove prout de jure the amount of the land-tax payable to the public, for the year 1798, out of the petitioner's 'estates in the county of Roxburghe; the rent or the annual 'value of the lands mentioned in the petition, proposed to be 'sold for purchasing the said land-tax; if the same can be sold 'without injury to the remainder of the estate; and if it is the 'most proper part of the estate to be sold, (all circumstances 'considered);—all in terms of the statutes made in that behalf; 'and grant commission to the Sheriff-depute,' &c. A proof was accordingly led, of the amount of the land-tax payable out of the estate,—the rent or annual value of the part of the estate proposed to be sold,—that the sale would not materially injure the remainder of the estate,—and that the part so proposed to be sold was proper under all circumstances; but no proof was adduced to shew that the lands could not be divided, nor that the

sale of the whole would be more advantageous to the heirs than a part only. A regular state was then drawn up, from which it appeared that the land-tax, with the $\frac{1}{10}$th over required by the statute, amounted to L.62. 1s. $5\frac{10}{12}$d.; and that Government stock, to produce a dividend equal to that sum, could be bought for something above L.1200. The state then proceeded in these terms:—'The rent or value of the lands proposed to be 'sold appears to be L.234. 9s. sterling, including conversions; 'and without doubt, in the event of a sale, they must bring a 'price considerably more than is necessary for the redemption 'of the land-tax. But this price will be vested in a trustee for 'fulfilling the purposes of the Act of Parliament,—1*st*, In re-'deeming the land-tax, and defraying the expenses of the pro-'ceedings in carrying through the sale of the lands and purchase 'of the land-tax; and, 2dly, In applying, under the authority of 'the Court, the surplus in payment of debts affecting the en-'tailed estates. These, in the present case, amount to above 'L.7000 sterling, which will fully exhaust the surplus arising 'from the price of the lands proposed to be sold, after purchas-'ing the land-tax. In these circumstances, therefore, it is 'humbly submitted, that there can be no objection to the sale of 'those lands being allowed to proceed.' A draft of the articles and conditions of the roup and sale was laid before the Court, who were craved to authorize the lands to be exposed to sale, and to approve of the trustee and cautioner named by the petitioner. On the 9th July 1803, their Lordships 'found it suffi-'ciently instructed and proven, that the land-tax, payable in the 'year 1798, for the petitioner's estate of Stobs, lying in the 'county of Roxburghe, amounted to L.56. 8s. $7\frac{6}{12}$d. yearly: 'Find, that the yearly rent of the lands proposed to be sold 'amounts to L.234. 9s. sterling, exclusive of an obligation upon 'the tenants to assist, with a specified number of men, women, 'and horses, for casting, winning, and leading peats and hay to 'the landlord: Find, that this is the most proper part of the estate 'to be sold for raising money to purchase the above-mentioned 'land-tax: Approve of William Riddell, Esq. W. S. as trustee 'for the petitioner, and of Lieutenant-Colonel Edgar Hunter, of 'Linthill, as his cautioner, for the due execution of the trust in 'terms of the statute; and likewise approve of the articles and 'conditions of sale subjoined to the state of the proof, with the 'addition* to the 5th article made by order of the Court: Grant

May 2. 1828.

* The addition is in italics:—V. 'Upon the purchaser's making payment of the price

May 2. 1828. ‘ warrant to and authorize the petitioner and his said trustee to ‘ sell the before-mentioned lands by public auction, in terms of ‘ the articles and conditions of roup before referred to, and of ‘ the statutes made in that behalf; appoint the sale to proceed in ‘ Edinburgh, &c.; and authorize an act and warrant to go out ‘ and be extracted hereupon, the trustee and his cautioner always ‘ lodging in process, before extract, a bond for the due execu- ‘ tion of the trust in terms of the statute.’

The draft of the articles of roup and sale was blank in the names of the trustee and cautioner, and in the upset price.

The trustee and cautioner lodged bond, and an act and warrant was extracted in favour of Sir William and the trustee, authorizing the roup and sale, and fully setting forth the tenor of the petition, and the detail of the intimations, proceedings, and interlocutory orders. In this act and warrant, the upset price remained blank. Sir William afterwards filled up the blank in the articles and sale with the sum of L.9000. He also added a clause, declaring, that the bond to be granted by the purchaser should be also signed by a sufficient co-obligant; that the right to the teinds of the lands under sale was reserved; and that the land-tax payable for and in respect of the lands under sale, was not to be redeemed by the exposer. At the sale, which took place in September 1803, the tenant of the lands at once offered L.12,000; and after some competition Sir William bought them for L.15,420, and granted the trustee a bond for the price. In April of the following year, he agreed to sell Hallrule to John Wilson for L.6912. 10s. At this time Sir William had not completed his own fee-simple title in the lands; but he bound himself forthwith to complete that title, to be holden of the Crown, and to infeft Wilson in due form à me vel de me. Thereafter, in May 1804, Sir William completed his own title, by executing a disposition of the lands, as heir of entail in possession, (with consent of the trustee), in favour of himself, his heirs and assignees, founding upon the act and warrant of Court, and of the roup following thereon, and granted procuratory of resignation and precept of sasine. He, of same date, executed a disposition in favour of Wilson, which bore, that in regard the price at which I, the said Sir William

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‘ to the said trustee, *and the trustee producing evidence of the application thereof in* ‘ *terms of the statute*, the said Sir William Eliott shall be bound and obliged to grant ‘ and subscribe a formal and valid disposition of the foresaid subjects to the purchaser, ‘ containing all usual and necessary clauses,’ &c.

'Eliott, purchased the foresaid parts of my said entailed estate 'of Stobs, (whereof the lands herein after disponed are a part), 'has not yet been paid or applied in terms of the foresaid act 'and warrant, nor the application thereof been approved of by 'the Court of Session,' it has been agreed, that the price of the lands herein after disponed, purchased by the said John Wilson, should be paid to the trustee to account of the price of the whole entailed lands purchased by Sir William, to be applied in terms of the act and warrant; which payment was made and receipt acknowledged by the trustee. Wilson was infeft in August following; and in December thereafter, and February 1805, Sir William took infeftments and recorded them; and in March he made resignation ad remanentiam, the instrument of which was also recorded. May 2. 1828.

In January 1805, Sir William agreed to sell to Wilson another parcel, being a part of the lands of Town o' Rule, with the teinds, and of valued rent sufficient to afford a freehold qualification. He executed a regular disposition thereof in January 1806, which also contained the clause just quoted, and Wilson took infeftment. Thomas Cleghorn subsequently bought the remainder of Town o' Rule, and the superiority of Weens, from Sir William, and also from Wilson a portion of the lands of Hallrule.

The whole of the property which Sir William had thus purchased under the proceedings in the Court of Session, he sold for L. 23,600.

In the meanwhile, Sir William and the trustee presented an application to the Court of Session for approbation and exoneration, resuming the state of the previous proceedings, and detailing what had been done. They stated, that besides redeeming the land-tax, debt affecting the entailed estates had been paid to the extent of L. 7854. 12s. 5d., and that there remained an unappropriated balance of L. 6157. 8s. 7d.; which, in terms of the statute, must be laid out in the purchase of lands, to be limited and settled in the same way as the lands sold were limited and settled, or otherwise applied and secured as the Court should direct; and suggested, that it should be heritably secured over the lands of Town o' Rule and others now belonging to Sir William in fee-simple, or otherwise; and that such part of these lands as were equal in value to that balance should be disponed back to himself and the heirs of entail. The Court remitted to the Lord Ordinary, with power to intimate to the substitute heirs of entail, (and these failing to appear), to appoint an agent

May 2. 1828. to attend to the interests of the entailed estate. Intimations were made, and an agent appointed. But although a draft of his report was drawn up, it never was presented; nor did the Court ever approve of these proceedings, or exoner the trustee; and, in the interim, the lands had been sold as above-mentioned.

The trustee did not pay the price into the Bank of England; nor did he ever produce evidence of the price having been applied in terms of the statute.

Sir William died, and burdened the entailed estate with certain provisions to his younger children, four of whom in 1819 petitioned the Court to have this balance applied in payment thereof, which was authorized, (leaving a very trifling balance still to be accounted for by the trustee), on the petitioners assigning their claims in trust for behoof of the heir of entail in possession of the estate of Stobs for the time.

The purchasers from Sir William entered into possession, and laid out large sums in ameliorations.

In 1822 Sir William Francis Eliott, Bart. of Stobs, eldest son of the deceased Sir William, raised an action of reduction against Wilson and Cleghorn, the purchasers, calling for production of the act and warrant of the Court authorizing the sale of the lands of Hallrule, Town o' Rule, and Hallrule Mill; the articles and conditions of roup, and minutes of roup; the dispositions granted by Sir William in favour of himself as purchaser, and all the subsequent titles; and concluding, that these deeds and writings should be reduced and declared to be null and void, and the pursuer restored thereagainst in integrum; and being so reduced, it should be found and declared, that the pursuer had the only good and undoubted right and title to the said lands, and to possess the same, and uplift the rents thereof; with conclusion of removal against the defenders, and those holding under them.

The Lord Ordinary, on the 10th June 1824, reduced, decerned, and declared in terms of the reductive conclusions of the libel. The Court, on advising a petition and answers, on the 23d June 1825, pronounced this interlocutor: 'Find, that the defenders cannot 'be hurt by any alleged fraud on the part of the late Sir William 'Eliott, in carrying through the sale under the authority of the 'Act of Parliament, or, as alleged, in deceiving the Court against 'the pursuer or other heirs of entail, if the sale, in other respects, 'had been regularly conducted in terms of the Act of Parliament; 'but find, 1mo, That the original petition to the Court for autho-'rity to sell the lands in question did not, in terms of the Act

'of 42. Geo. III. c. 116., set forth the amount of the land-tax May 2. 1828.
'proposed to be redeemed, and that the petition was intimated
'under the authority of the Court in this imperfect state: Find,
'that a minute was afterwards given in, containing a certificate
'of the amount of the land-tax; but that this minute, even if it
'could be held as supplying the original defect in the petition,
'was not intimated as the Act requires the petition to be,
'and therefore cannot supply the defect in the petition. 2do,
'Find, that as the petition prayed for authority to sell lands
'in point of rent and value much more than sufficient to redeem
'the land-tax of the whole estate, it was requisite, by the 63d
'section of the Act, that the petition, besides being intimated on
'the walls of the Court, should be intimated personally to the
'next heir of entail in Great Britain being of lawful age:
'Find, that no evidence of such intimation was laid before the
'Court: Find, that the letter from Mrs Guy, which has since
'been produced in this process, does not contain evidence that
'sufficient intimation was made to her; as from that letter it
'does not appear that the Mill of Hallrule and mill lands had
'been included in the intimation to her, of which her said letter
'is an acknowledgment. 3tio, Find, that the articles of roup,
'as prepared by Sir William Elliot for the approbation of the
'Court, did not specify any upset price, but left that blank, and
'the upset price was thereafter fixed by some private authority,
'without any warrant from the Court. 4to, Find, that the
'articles of roup, even as thus imperfectly prepared, were after-
'wards altered by Sir William Eliott, without any authority of
'the Court, by excepting the teinds, and by declaring that the
'lands to be sold were to remain subject to their proportion of
'the land-tax. 5to, Find, that this alteration was not only not
'warranted by any authority from the Court, but was in itself in
'the face of the statute, which provides, that no lands shall be
'sold, except for the redemption of the land-tax thereof. 6to,
'Find, that no proof was offered to the Court of the necessity
'or expediency of selling so large a quantity of land and supe-
'riority to redeem this comparatively small amount of land-tax;
'while, from subsequent proceedings, it appears that these lands
'might have been disjoined, and any part of them sold sepa-
'rately, which, in fact, was soon afterwards done by Sir William
'Eliott to these defenders. 7mo, Find, that the price was not
'paid into the Bank of England, as required by the Act, before
'granting dispositions to the purchasers. 8vo, Find it proved
'by the terms of the dispositions to the defenders, that they were
'made aware that the Act had not been followed out. 9no, Find,

May 2. 1828. 'that the sales in question never were reported to and approved 'of by the Court. Therefore, on the whole matter, adhere to the 'interlocutors complained of, and refuse the desire of the peti- 'tion, reserving to the defenders their claims for repetition of 'the price from the pursuer, in so far as any part of it was 'applied to redeem the land-tax, and to discharge the burdens 'which either affected, or which could have been made to affect, 'the entailed estate, or the pursuer, the heir in possession; as also 'reserving to the defenders any claim they may have for ameliо- 'rations on the lands respectively purchased by them; and to 'the pursuer, on all these points, his objections, as accords; also 'reserving to the pursuer his claim for repetition of the rents, 'and to the defenders their objections thereto, as accords: 'And remit to the Lord Ordinary to hear parties on all these 'points, and to do therein as he shall see cause, and decern.' And thereafter, on the 9th February 1826, their Lordships adhered, but gave leave to the defenders to appeal. The pursuer had also petitioned the Court on two points, with which he was dissatisfied:—1st, As to the defenders not being hurt by any alleged fraud on the part of the late Sir William Eliott; and, 2dly, As to the intimation to Mrs Guy being to the proper party. But the Court refused his petition, and adhered; giving him, however, also leave to appeal.*

Both parties, accordingly, appealed.

Wilson and others (appellants in original, respondents in cross appeal).—I. The plea of the respondents is, that Sir William Eliott ought to have proceeded under the 63d, and not the 61st section of the statute, he having in contemplation to sell more land than sufficient to redeem the land-tax. But the 63d section is merely supplementary of the 61st section. The Act of 42. Geo. II. on which Sir William founded generally, consolidated the previous statutes on the subject; and these statutes shew that the respondents' objections are unfounded. The 63d section was never intended to operate by itself, since it is quite silent as to advertisements and intimation on the walls.† Even if the respondents were right, that the Court had in some respects deviated from the strict letter of the statute, this would not

* See 4. Shaw and Dunlop, No. 289.

† The appellant went into a great deal of argument, to shew that the different findings of the Court of Session were erroneous; but as the House placed their judgment on a different ground, it is not necessary to advert to it.

nullify the proceedings. It might perhaps found a claim by the purchaser against the exposer, but not against a bona fide purchaser himself. However, all the alleged deviations did not exceed the bounds of fair discretion,—none of them counteracted or defeated the purposes of the statute. Besides, the appellant should, on legal principle, be protected. No third party acquiring onerously is liable for the mistakes or blunders of a Court, or for the misconception into which Judges may be betrayed. A purchaser is safe if it appears that the Court was truly addressing itself to execute the statute under which the warrant was granted, and that the matter was so brought before the Court as to enable them to exercise the powers with which the statute has intrusted them. Accordingly, in the present case, however ill-founded the warrant may have been upon the merits, still it protects the bona fide onerous purchaser. The Court had a public statute before them, and, if they erred, that error cannot affect the appellants, who were no party to the suit, nor participators in the blunder. The very issuing the warrant implies that the provisions of the Act had been obeyed, and that the Court had considered itself in a situation to exercise its statutory powers. Error in merits does not nullify a proceeding, and there is no principle why an error in form should have a different effect. The Legislature reposes confidence in the ability of Judges, and if they have been mistaken, a purchaser who reposed like confidence in the ability of the Court, who acted with undoubted bona fides, and who gave full value for the subject, ought to be protected from loss. May 2. 1823.

II. But it is also alleged, that Sir William wished to appropriate the lands to himself at an under-value. There is no evidence of that charge; but even if true, it cannot affect the appellants.—'Fraus auctoris non nocet successori.' They acquired the properties for value,—were in perfect good faith,—have been long feudally invested in the subjects they bought; their rights therefore cannot be touched by any fraud of their author. To meet this defence the respondent contends, that the sale and fee-simple title in the person of Sir William never having been approved of by the Court of Session, there is even yet, in the eye of law, no feudal title at all, and therefore no protection afforded to the appellants against the fraud of their author. But the interference and approval of the Court of Session are not required by statute to give validity to the title of a purchaser; and the fee-simple investiture of Sir William, and of his disponees, was as complete as any express sanction of the Court could have

May 2. 1828. rendered it; and this shews the irrelevancy of the objection, that the declaration that the price 'had not yet been paid or applied 'in terms of the act and warrant,' &c. was inserted in the appellant's titles. Then he maintains, that Wilson made his first purchase before Sir William had completed his own title, and therefore the right conveyed, being personal, was tainted by the frauds of Sir William. It is, however, tritissimi juris, that the infeftment of Sir William accrued to that of the appellant, and perfected it. Besides, the appellants have all been regularly infeft. The whole of the respondent's doctrine proceeds on an erroneous view of true principles of law. Exceptio doli does not, even in personal rights, transmit to the successor upon an onerous title, except in cases of participation in the fraud, or where there is labes realis, and in certain assignations of personal rights continuing personal. This last exception depends on a peculiar ground, that an assignee, although for onerous consideration, is not considered as properly a singular successor, but as a mere procurator in rem suam, and still in his character of procurator representing the cedent; but when that character terminates, as by taking infeftment, then he is no longer answerable for his author. Indeed, the numerous authorities on the point make it too clear to be seriously doubted, that all challenges founded upon the fraud of the author are unavailing against a singular successor, if the challenge has not been brought till after the infeftment of the assignee, or of his author.

Sir William Francis Eliott (respondent in original, and appellant in cross appeal).—I. The late Sir William Eliott, wishing to benefit himself at the expense of the entailed estate, sold (under pretence of redeeming L. 56. 8s. $7\frac{6}{12}$d. of land-tax) entailed property for L. 15,420; he became himself the purchaser; and, although the only hypothesis on which he could have been permitted to sell that amount, was, that the portion sold was not susceptible of expedient division, he, within little more than a twelvemonth, disposed of it in four portions for L. 23,600. At this time the respondent and the rest of the children were in pupillarity. The only way the late Sir William could effect his purpose was by misleading the Court. If he wished to sell more land than the land-tax required, the 63d section was his guide; if only the precise amount requisite for the redemption, then the 61st. But he so shaped matters as to induce the Court to believe that the latter was his purpose; and they issued their orders accordingly, overlooking every part of the statute they ought to have, under the true circumstances of the case, enforced, and

enforcing that which had no application.* If the applicable sections of the statute had been attended to, a proof should have been allowed that 'such farm, lands, or tenement,' could not be divided, in order that an adequate part might be sold, and that the sale of the whole would be more eligible and advantageous. But these particulars were not allowed to enter into the inquiry. The consequence was, that the barony was cut in two, and sold to redeem what any single farm,—what the very superiorities would have been more than equal to. No notice was taken of the value of the wood, of the grassum paid at entry by the possessing tenant, of the tenant's services, and of the valued rent, (the whole property holding of the Crown). By not executing the statutes the Court exceeded their powers. The authority of the Court, in matters of this kind, is a specified and limited authority for a particular purpose; and unless the directions given by the Legislature are obeyed, the Act of Parliament, and the judgment following, could give no title to sell, and convey no right to the purchaser. Here the Court did not obey the statute, and Sir William neither obeyed the statute nor the Court. No doubt, where a Court is acting within its jurisdiction, mere errors in judgment will not be permitted to annul the titles of persons reposing, in bona fide, on the faith of the orders of the Court. But here the Court never assumed, and never pretended to assume, the proper jurisdiction applicable to the facts of the case. The question is the same as if the two situations had been regulated, not by different sections, but by different statutes, and the Court, either from inadvertence and mistake, or by being misled by the party, had proceeded on the wrong statute. May 2. 1828.

II. Besides, the appellants were aware of the imperfection of these proceedings, and of the devices practised by Sir William. But, if so, their title must be annulled, as flowing from a person who held a vitious title. It is clear law, that when a purchaser acquires an heritable estate from a party, who has not been infeft in it previous to the sale, or, even when infeft, if he were aware of the fraud of his author, then, Fraus auctoris nocet successori,—under the exceptions of purchasing on the faith of the record, or (as to moveables) in open market. Of course, this destroys Wilson's title to both portions; and also destroys the titles of Cleghorn, whose title-deeds betray their knowledge of the imper-

* The respondent argued at much length in support of the findings of the Court, but this, for the reason already mentioned, does not require to be particularly noticed.

May 2. 1828. fection of the proceedings under which they bought. Wilson's argument, on the effect of his own infeftment in his first purchase, is fallacious. An infeftment may put a person in titulo to dispose to a third party, but cannot cure an objection to his own title, while the property remains in himself. It has no doubt been said, that it is possible to cure defects in the title of a singular successor by his author's subsequent infeftment. But there seems no authority for that supposition. The case of a person purchasing from an heir of entail, and taking infeftment before the entail is recorded, neither applies in principle or analogy. Besides, knowledge on the part of a singular successor has the same effect as want of sasine, and would neutralize the effect of sasine, whatever that might be. But, in truth, it is not necessary to raise this question. Even without fraud, a reduction is fully warranted, where the right sought to be reduced flows from one whose own title to the land is null and void; and that Sir William never vested in himself a good and unchallengeable title, is manifest from the whole detail that has been given.

The House of Lords, in respect it appears 'that the Court of 'Session, before pronouncing their interlocutor of the 9th of July '1803, authorizing and appointing the sale therein mentioned, 'had not before them any evidence that the farms, lands, or 'tenements thereby appointed to be sold, could not be divided, 'so that an adequate part only might be sold, nor any evidence 'that the sale of the whole of such farms, lands, or tenements, 'would be more eligible and advantageous to the said entailed 'estate, and to the successive substitute heirs of entail, than the 'sale of a part thereof only; It is ordered and adjudged, by the 'Lords spiritual and temporal in Parliament assembled, That 'the said several interlocutors complained of in the said original 'appeal be, and the same are hereby affirmed; but it appearing 'to their Lordships that the said interlocutors ought to be 'affirmed for the reason above stated, this House does not think 'it necessary to pronounce any judgment upon any of the other 'reasons stated in the interlocutor of the 7th of June (signed '23d of June) 1825, adhering to the former interlocutors therein 'referred to: And it is further ordered, that the said original 'appeal, and also the said cross appeal, be, and the same are 'hereby dismissed this House.'

Appellants' Authorities.—42. Geo. III., and previous Redemption of Land-tax statutes; 54. Geo. III. c. 123. § 12.; Lord Wemyss, Feb. 28. 1821, (affirmed on appeal, Feb. 25. 1824.; Shaw, vol. i. No. 1.); Lawrie, Feb. 11. 1806, (App. 1. Pub. Bur. No. 2.) affirmed on appeal, July 27. 1814, (Dow's Rep. vol. ii. p. 556.); Voet, 44. tit. 4.; Kames' Elucidations, art. 3.; Stair's Inst. 4. 40. 21.

Respondent's Authorities.—42. Geo. III., and previous Redemption of Land-tax statutes; Stair's Inst. 4. 40. 21.; M'Donells, Nov. 20. 1772, (4974.); Bankton's Inst. 1. p. 259. § 65.; Burdon, (Elchies on Fraud, No. 11.); Stair's Inst. 3. 1. 21. May 2. 1828.

FRASER—RICHARDSON and CONNELL,—Solicitors.

No. 6.

WILLIAM BURRIDGE CABELL, Cashier to the Glasgow Bank Company, Appellant.—*Bosanquet—Spankie—Fullerton.*

JAMES BROCK, (Newbigging and Company's Trustee), Respondent.—*Sol.-Gen. Hope—Adam—T. H. Miller.*

Title to Pursue—Lease—Assignation in Security.—A mercantile company, in possession of a lease of a printfield, having borrowed money from a private Bank, and granted an assignation of the lease in security to the Bank, which was intimated to the landlord; and the Bank having thereupon granted a sub-lease to the company, who remained in possession, and paid the rents; and no possession having been taken by the Bank; and the Court of Session having held, in a question with the trustee on the sequestrated estate of the company, that the assignation was not effectual against the creditors; and the Bank having appealed in name of the office-bearers;—Question raised, but not decided, 1. Whether they had any title to appear; and, 2. A remit made to take the opinions of all the Judges on the merits.

May 13. 1828.

2D DIVISION. Lord Cringletie.

BY two separate deeds of tack in 1800 and 1801, James Buchanan, Thomas Hopkirk and Company, (of whom, among others, Archibald Newbigging was a partner), merchants in Glasgow, obtained certain portions of the lands and estate of Denovan, from the proprietor, Johnston of Alva, on lease for 100 years, with the right, liberty, and privilege of using the same as a printfield, bleachfield, &c. The leases were taken to the Company, and to the partner or partners who might be assumed, and to their heirs, assignees, and subtenants whomsoever, 'but for 'whom always the original tenants shall continue bound.' Having entered into possession, the company converted the premises into a bleachfield and printfield, built houses, erected and placed extensive machinery and utensils, and furnished the subjects with every implement essential to the proposed operations. In 1806 this company was dissolved, and in January 1807 they assigned the whole premises to Archibald Newbigging, and his heirs and assignees.* This assignation was recorded in March

* In the question which arose, it was maintained by the opposite party, that there was satisfactory evidence in the case, that this assignation was taken solely for the

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1808. In September 1807 Archibald Newbigging formed a company with John Newbigging and Peter Scott, who had also been partners of the previous company. These parties entered into possession of the subjects, made extensive additions and alterations on the buildings and machinery, and carried on the works. In 1809, the company requiring a cash-credit, obtained one from Kensington, Styan and Adams, of London. The bond for this credit, and assignation of the leases in security, were granted solely by Archibald Newbigging, and the leases were declared redeemable by him, his heirs and assignees. This deed was recorded in the same year. Kensington, Styan, and Adams having failed, and the money having been called up, Newbigging and Company required pecuniary assistance in another quarter. They therefore entered into a transaction with the Glasgow Bank Company, for the advance of L.7000; and for an after sum of L.5000, if required. This was effected by an assignation on the 12th March 1816, by Newbigging and Company, which, after describing the leases, and the assignation to Archibald Newbigging, proceeds:—'And seeing that the partners of the company 'carrying on business under the name and firm of the Glasgow 'Bank Company, have, by the hands of William Burridge 'Cabbell, Esq. banker in Glasgow, their cashier, and from the 'funds of the said banking company, instantly advanced and 'paid to us, the said Archibald Newbigging, John Newbigging, 'and Peter Scott, as partners foresaid, for the use of the said 'company of Archibald Newbigging and Company, the sum of 'L.12,000 sterling, of which sum receipt, &c.; therefore we, 'and each of us, as individuals and partners foresaid, have sold 'and assigned, as we and each of us, of one advice and consent, 'do hereby sell, alienate, assign, &c. from us, and each of us, 'and one and each of our heirs, executors, and successors, to 'and in favour of William Burridge Cabbell, cashier, and Ro-'bert Brown, accountant, for themselves, and as trustees for the 'other partners of the Bank, and to the assignees and subtenants 'of the said William Burridge Cabbell, and Robert Brown, and 'survivor of them, and the heir of the said survivor, absolutely 'and irredeemably, not only All and Whole the two tack rights, '&c. with full right to the possession, use, and disposal of the 'subjects, grounds, and buildings, and others therein described,

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behoof of the company." On the other hand, it was contended, that there was no foundation whatever for this averment.

'for all terms and years thereof to run from and after the date 'thereof, in so far as we, or any of us, or our foresaids, had, 'have, or can pretend right thereto in any manner of way, But 'also the whole of the buildings, machinery, printing utensils, 'and others erected by and belonging to us, or any of us, in 'said company of Archibald Newbigging and Company, in or 'upon the subjects set; together with the said tacks,' &c. On the other hand, the Bank obliged themselves, by acceptance, to relieve Newbigging and Company of the tack-duties and other obligations payable by or incumbent on the tenants by the terms of the original leases. Of the same date Archibald Newbigging and Company granted their promissory-note for L. 7000, at twelve months, to Messrs Muir and Johnstone, and on their indorsation it was discounted by the Bank, who retained the discount of L. 350. Also of the same date Newbigging and Company wrote to Mr Johnstone, the landlord,—'In 'consequence of a considerable part of our funds being for the 'present locked up in the hands of several houses here, (Glas-'gow), who have suspended payment, we have made an applica-'tion to our bankers for a temporary loan upon our works at 'Denovan, which loan they have granted to us in the hand-'somest manner. The forms of law, however, require that this 'measure, although only of a temporary nature, must be inti-'mated to you, and our partner, Mr Scott, will wait on you for 'that purpose. Although we find that our funds are by present 'wants to be withdrawn for a time from the business, our own 'prospects are, that they will be restored in good time, under no 'greater ultimate loss than from L. 1000 to L. 2000.' On the 14th March 1816 this assignation was intimated to Mr Johnstone. The notarial instrument then taken bears, 'that the said 'assignation was duly and legally intimated, and that the said 'James Johnstone, and his heirs and successors, should be liable 'to the said William Burridge Cabbell and Robert Brown, for 'themselves, and as trustees foresaid, and their foresaids, in per-'formance of the whole conditions and obligations incumbent on 'him and them by the foresaid tack, and should be bound to 'consider them as in all respects his lawful tenants in the subjects 'in time coming, in terms of the said tack and assignation, and 'should not pretend ignorance thereof.' Mr Johnstone wrote on the deed, 'The foregoing assignation intimated to me at Alva, '14th March 1806. JAMES JOHNSTONE.' And an entry, acknowledging the assignees, was made in his book by his agent or factor. On the 15th March the following missives were in-

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May 13. 1829. terchanged between the Bank and Newbigging and Company: 'Messrs Archibald Newbigging and Company. Gentlemen, '—We, as assignees to the tacks thereof, hereby offer and 'agree to subset to you the printfield, ground, houses, and ma-'chinery at Denovan, as presently occupied by you, for the 'space of one year from this date, at the subrent of 'per annum, over and besides the whole rent and others payable 'to Mr Johnstone, the landlord, and others, for the same, which, 'with all taxes, burdens, and duties whatever affecting the pro-'perty or possession, you are to pay and fulfil, as well as to up-'hold and keep the whole buildings, fences, machinery, in good 'order and repair; and having by our cashier, Mr William 'Burridge Cabbell, signed this missive, written by William Lang, 'writer in Glasgow, at Glasgow the 15th March 1816, we are, '&c. for the Glasgow Bank Company, (signed) W. B. CABBELL.' —'To the Glasgow Bank Company. Gentlemen,—We do here-'by accept of the offer expressed in the above letter, subscribed 'by your cashier; and obliging ourselves to pay and fulfil the 'rents, taxes, and obligations therein mentioned or referred to, 'have subscribed this missive, written by me Archibald New-'bigging, at Glasgow this 13th March 1816. (Signed) ARCHI-'BALD NEWBIGGING and Company.' Of the same date Cabbell and Brown, on behalf of the Bank, granted their back-bond to Archibald Newbigging and Company, which, after narrating the leases and different transmissions thereof, proceeded, 'And 'also considering, that although the said disposition and assig-'nation in our favour proceeds on the narrative of the said 'Glasgow Bank Company having, by the hands of me, the said 'William Burridge Cabbell, their cashier, actually advanced and 'paid the sum of L.12,000 sterling from the funds of the said 'Banking Company to the said Archibald Newbigging, John 'Newbigging, and Peter Scott, for the use of the said Company 'of Archibald Newbigging and Company, for and in considera-'tion of the said assignment; yet we hereby declare, that the 'same was only granted, and the said tacks and others disponed, 'by the said Archibald Newbigging, John Newbigging, and 'Peter Scott, in security of the punctual repayment, in the first 'place, of the sum of L.7000, and interest to become due thereon, 'contained in and due by a promissory-note, of date the said 12th 'March current, and payable twelve months after date, granted 'by the said Archibald Newbigging and Company to William 'Johnstone, Hugh Muir, and Robert Hugh Muir, merchants in 'Glasgow, and indorsed by the three payees to the said Glasgow

'Banking Company for the said sum of L.7000 sterling, advanced 'by that Company to the granter; and, in the second place, in 'security and for payment of such other sums or balance as the 'said Archibald Newbigging and Company are, or shall become 'owing to the said Banking Company, in account or credit with 'the latter, not exceeding in all the said sum of L.12,000 sterling, 'including the contents of the said promissory-note.' And this clause followed, binding the Bank to denude 'in favour of the 'said Archibald Newbigging, &c. and their foresaids, of the said 'disposition and assignation in our favour, and of the tacks and 'others above-mentioned, thereby conveyed, and for that pur-'pose to grant, subscribe, and deliver, on the expenses of the 'grantees, to and in favour of the said Archibald Newbigging 'and Company, and the individual partners thereof, a formal 'retrocession, assignation, and reconveyance of the said tack and 'others.' It was also declared, that in case Johnstone, Muir, or Hugh Muir, or their heirs or successors, paid the L.7000, then the retrocession should be granted in their favours, for the better enabling them to operate their relief, they being in fact merely cautioners for Archibald Newbigging and Company. When the bill of L.7000 fell due, it was renewed, the Bank deducting discount; and this mode of operation continued until July 1819, by which time the Bank, in consequence of increased advances, were creditors of Archibald Newbigging and Company for L.6648. 10s. 5d. more. In the meanwhile, Archibald Newbigging and Company remained in possession of their premises,—paid the rent as usual to Mr Johnstone, and all the burdens and taxes affecting the Denovan works,—and received receipts in the same terms as before. The Bank never paid any rent to the landlord; nor did Archibald Newbigging pay rent to the Bank, unless it were possible to consider the discount on their various bills as rent. The Company made extensive additions to the moveable stock of utensils, and to the buildings; and insured the works in their own names. Accordingly, Mr Johnstone, in the course of the following summer, in letting them an additional portion of land in the neighbourhood of Denovan, designated them 'tenants of the printfield of 'Denovan;' and the evidence predominated, that the rent received from them by the landlord, was never considered by him as paid on the part of the Bank. Neither did the Bank ever take natural possession of the subjects; nor was any instrument of possession executed, or inventory made up, of the machinery and utensils.

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May 13. 1828. In July 1819 Archibald Newbigging and Company became bankrupt, were sequestrated, and Walter Brock appointed trustee. On receiving this information, the landlord intimated to the Glasgow Banking Company, that he held them liable for the current and future rents of the printfield, and other property of Denovan, possessed by Archibald Newbigging and Company, in terms of the intimated assignation. The trustee entered into the natural possession of the premises; paid the rents, and performed the obligations incumbent on the bankrupts as those fell due. The Bank, learning that he proposed to dispose of the machinery and utensils, presented a bill of suspension and interdict, which was passed, and interim interdict granted. The Lord Ordinary, when the letters were expede, suspended simpliciter, and continued the interdict; and afterwards adhered, 'reserving 'to the trustee to demand from the Bank the value of any addi-'tion made to the machinery existing at the date of their as-'signment thereto, which additions may be considered separate 'from, and extensions of what formerly existed, if such additions 'there be; and to the Bank their defences against paying such 'value, and also their claim against the trustee, to put the 'machinery in the order stipulated by the lease.' The trustee now raised an action of declarator against the Bank, stating, that the pursuer, in his character of trustee, had entered into and taken possession of the whole subjects contained in the leases, and of the whole buildings, machinery, materials, utensils, furniture, and other articles which had been erected, furnished, and fitted up thereon, and had continued to possess the same, paying to the landlord the proper rents at the usual terms, and defraying the burdens and charges connected with the property; that when about to realize, as trustee, the said whole subjects and others, he had been molested and interrupted by the Glasgow Bank Company and the cautioners, 'who, without any proper or legal 'title fairly completed and made up in their persons, but on the 'faith alone of some simulate and colourable title, privately and 'improperly concocted by them, and never published or com-'pleted in a legal sense, nor, in fact, at all acted upon in any real 'shape whatever, and, at any rate, ineffectual in law, and altoge-'ther different from the one pretended to be entered into between 'them and the said Archibald Newbigging and Company, falsely 'and injuriously, and to the great prejudice of the sequestrated 'estate, and the interest of the creditors, pretend that the whole 'right to the foresaid leases, and the use and possession of the 'subjects thereby let, together with the right to possess all build-

'ings, and the property of the machinery, materials, &c. and 'the articles of whatever kind or denomination, is now completely 'and absolutely vested in them, to the entire and utter exclusion 'of the pursuer as trustee foresaid;' and concluding, that it should be found and declared, 'that the pursuer (as trustee fore-'said) has the only good and undoubted right, not only to the 'two tacks, and whole terms and years still to run, and to the 'free use and enjoyment and disposal of the subjects therein 'described, but also to the value and right of possession of the 'whole buildings, and to the property of the whole machinery, 'materials, utensils, furniture, and other articles of whatever 'description or denomination, situated upon the said subjects or 'others at Denovan aforesaid, in so far as the said original 'tenants had, or would have had right thereto, if no such pre-'tended assignation had ever been made; together with the said 'tacks and other relative writings, &c.; and that the said William 'Burridge Cabbell and Robert Brown, whether for themselves, 'or for and in name and in behalf of the said Glasgow Banking 'Company, or as trustees for the whole partners of the said 'Bank, or in whatever other character they pretend right to the 'foresaid leases, subjects, and others; as also the said William 'Johnstone and Robert Hugh Muir, before designed, have no 'right or title to the same, and that the said defenders should 'be decerned to cease from molesting or interrupting the pur-'suer as trustee aforesaid in the free use and enjoyment, &c. in 'all time coming.'

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The Lord Ordinary conjoined the processes, adhered in the suspension, and assoilzied in the declarator. On advising petition and answers, the Court, on the 15th November 1821, altered, and found, that under the whole circumstances of this case, the assignation founded on cannot be effectual against the trustee for the creditors of the cedents; and therefore, in the suspension, found the letters orderly proceeded, and in the declarator decerned in the terms of the libel; and on the 29th November 1822 adhered.*

The Bank appealed in name of their office-bearers, and when their Counsel began to argue the merits,

Solicitor-General Hope, (for the respondents), objected, That there were no proper parties to the appeal.† It was presented in the names of 'William Burridge Cabbell, cashier, and Robert 'Brown, accountant to the Glasgow Banking Company, for and

* 2. Shaw and Dunlop, No. 54. † This discussion occurred in 1825.

May 13. 1828. 'on behalf of that Company, and William Johnstone of Grange, 'and Robert Hugh Muir, merchant in Glasgow, cautioners for 'Archibald Newbigging and Company to the said Bank.' But they have no royal charter, and are not an incorporated body, and therefore had no persona standi.

Bosanquet (for the appellants).—The appeal is by two individuals, in their own names, for and on behalf of the Glasgow Banking Company, and of William Johnstone and Robert Hugh Muir, cautioners for Archibald Newbigging to the Bank. Although others may have a beneficial interest, these parties have a similar interest in their own right. If this were an appeal merely on the part of the Bank, the want of a charter might be fatal. But that is not the case. The assignation is to William Burridge Cabbell, cashier, and Robert Brown, accountant, for themselves, and as trustees for the other partners of the Bank. These individuals do not appear merely in their official capacity, but as trustees having important interests. Besides, here are the two cautioners, who have clearly an interest; for if the suspension fail, they must bear the loss.

Solicitor-General.—The object of an incorporating charter is to enable the corporate body to sue and be sued by a trustee. But this cannot be gained merely by a declaration in the Bank contract, that a trustee may sue and be sued. If the interlocutors are affirmed, execution might be attempted to be stayed on this very ground, that the proper parties were not in the field. The cautioners here are not interested in the assignation. Before they have a legal interest of any kind, they must shew that they are distressed. Their present interest is too remote and indirect. They are merely cautioners for due payment of the bills; but they have no title to sue until the Bank assigns to them a right to pursue.

Lord Gifford.—In the declarator I see little difficulty. It is directed against the appellants, as individuals, and also against the Company; but in the suspension, you sue on behalf of the Company.

Fullerton (for the appellants).—The case is not different from having sued for A and B, and certain others who are interested. The question truly is, whether or not the appellants come forward for the Company. The suspension and interdict merely apply to the machinery, and not to the lease. Besides, the suspension and interdict is good as far as concerns the two individual cautioners. They have certainly both a good title and a good interest; at any rate, the declarator is properly instituted.

Lord Gifford.—Observe, the appellants have appealed not in their individual character. Could this House allow the case to proceed as being in the name of the cautioners? I consider, that in the declarator you come here as assignees to the tack; but in the suspension the Company are at the Bar. The case is certainly materially different from that of the Commercial Bank against Pollock.* Counsel may therefore proceed, and this objection which has been raised, shall be considered before delivering judgment. May 13. 1828.

Counsel having been fully heard,—

Lord Gifford said,—I am not yet satisfied on the question of form. The Company appears in the suspension; the individuals in the declarator. But the appeal is brought on behalf of the Company. No doubt, there are also the cautioners.

Solicitor-General.—They have not paid. They have not been distressed, and cannot therefore be parties.

Fullerton.—Still they would have a good title to appear. They have been called as defenders, and are they not entitled to defend themselves?

Lord Gifford.—I am unwilling to turn you out, if you could get the matter amended. But how can you separate these actions? If the suspension is ill brought, and in it you find great difficulty in supporting the judgment, and the declarator well brought, can we still decern in the latter?

Fullerton.—We submit that your Lordships can. Such proceeding is adopted every day.

Solicitor-General.—But observe, no defences were given in for the parties called in the declarator; and can they who were never parties below become parties here?

Fullerton.—If the House can allow the matter to be remedied, there is nothing in the objection that they did not appear in the declarator. If they did not appear it was a judgment in absence, and they have an interest to appeal. Whether the appeal has been taken formally, is a different thing.

Lord Gifford.—The difficulty is, whether Cabbell and Brown have been so before the Court below, as to be parties here.

The consideration of the cause was then put off; but at the same time it was ordered, that the appellants be at liberty to apply for leave to amend their appeal. They accordingly by

* See postea, 28th July 1828.

May 13. 1828. petition prayed to 'have leave to amend their said appeal, by 'stating your petitioners, the said William Burridge Cabbell 'and Robert Brown, as appellants, for themselves, and as trus- 'tees for the individual partners of the said Bank; and, if ne- 'cessary, that your Lordships might make such order in regard 'to the said William Johnstone and Robert Hugh Muir, the 'cautioners, as to your Lordships might seem proper.' The appeal committee ordered the matter of the petition to be argued by one Counsel on each side at the Bar of the House. Some delay was created by abatement of the appeal by the death of Walter Brock, the respondent, and the revival in the name of James Brock. In the meanwhile, the statute 7. Geo. IV. c. 67. was passed, to regulate the mode in which Scotch Banking Companies may sue and be sued. But this Act provides, that nothing therein contained should in any way affect any question which may be in dependence before any Court of law at the passing of the Act. Both parties, however, having agreed to waive this saving clause, a petition was presented, (William Burridge Cabbell having, in terms of the statute, been registered as the individual by whom the Company was to sue or to be sued), praying that the case might be restored to its place and be heard; which prayer was granted. Counsel were then heard during the present session fully on the merits; but, as no decision was pronounced on them, and a remit was made to the Court of Session to review their judgments, it is unnecessary to give the arguments.

Lord Chancellor.—The point in this case is similar to the one raised in Breadalbane against Russell. That case Lord Gifford moved to be remitted to the Court of Session, to be reviewed generally, &c.* The question went back, but the case was disposed of on other grounds than the point of law.† I think, therefore, that your Lordships ought to be of opinion that the same course should be pursued here.

The House of Lords accordingly 'ordered and adjudged, that 'the cause be remitted back to the Court of Session in Scot- 'land, to review generally the interlocutors complained of in the 'said appeal: And it is further ordered, that the Court to which 'this remit is made, do require the opinion of the Judges of the 'other Division, and of the Lords Ordinary, on the matters and 'questions of law in this case stated in writing, which Judges of 'the other Division and Lords Ordinary are so to give and

* 1. Wilson & Shaw, 28th June 1825. † 5. Shaw & Dunlop, No. 433.

'communicate the same; and, after so reviewing the interlocu- May 13. 1828.
'tors complained of, the said Court are to do and decern in this
'cause as may be just.'

Appellants' Authorities.—Stair's Inst. 3. 1. § 1. 6.; Bankton's Inst. 3. 1. § 2. 6.; Ersk. Inst. 3. 5. § 2. 3.; Wallace, Nov. 16. 1750, (2805.); Douglas, June 6. 1794, (2802.); Yeaman, Feb. 2. 1813, (Fac. Coll.); Ersk. Inst. 2. 6. § 23.; Bell on Leases, (Edit. 1805.) p. 361.; Bell's Comm. vol. i. p. 51.; Chambers on Leases; Barnwell and Alderson's Rep. 514.; Turnbull, June 12. 1751, (868.); Bell's Comm. vol. ii. p. 614.; Arkwright, Dec. 3. 1819, (Fac. Coll.)

Respondent's Authorities.—Craig, 2. 10. 9.; Dirleton, 223. 295–6.; M'Kenzie's Observations, p. 37.; Mack. Inst. 2. 6. 5. and 8.; Stair's Inst. 2. 9. 4. and 7.; 2. 3. 2, 6.; Bank. Inst. 2. 9. 3, 4.; Ersk. Inst. 2. 6. 25.; Bell on Leases, 346. 354.; Bell's Comm. vol. i. p. 5. 51. 86. 187.; Stair's Inst. 3. 1. 8.; and 2. 3. 27.; Ross's Lectures, vol. ii. p. 386. 506.; Kilkerran, voce Competition, p. 145.; Russell's Conveyancing, p. 6. 23.; Elchies' Decisions, voce Tack, No. 17.

RICHARDSON and CONNELL—MONCREIFF, WEBSTER, and THOMSON,—Solicitors.

MARY BLACK M'NEILL, or JOLLY, Spouse of ROBERT JOLLY, Appellant. — *King's Advocate (Dr Jenner)—Brougham—T. H. Miller—Wilson.* No. 7.

MALCOLM M'GREGOR, Respondent.—*Lushington—Keay.*

Husband and Wife—Marriage—Proof—Process.—A party having raised a declarator of marriage and adherence against a woman, whom he alleged was his wife, stating in the summons an irregular marriage followed by consummation at Holytown, and the celebration of that marriage by a subsequent regular marriage in facie ecclesiæ in Edinburgh; and the wife having denied marriage and consummation at Holytown, and averred that she had not consented ad ipsum matrimonium in Edinburgh, but had been concussed by threats to submit to the ceremony there; and having immediately thereafter entered into a marriage with another party, enjoyed the status of marriage, and had a family; and the alleged first husband being perfectly aware of that status, and having expressly recognized her and husband in their character of husband and wife;—

1. Found, (reversing the judgment of the Court of Session), That there was no proof whatever of the Holytown marriage, nor of any regular marriage in facie ecclesiæ in Edinburgh; and further, taking into consideration all the facts and circumstances proved in relation to the conduct of the parties before and after the alleged Edinburgh marriage, that there was not evidence sufficient to justify the conclusion that the parties did, on the day when the Edinburgh marriage was said to have been celebrated, or at any other time, voluntarily and deliberately express that real mutual consent immediately to contract marriage, which, by the law of Scotland, is necessary to give validity to such an irregular marriage as was said to have taken place.

2. Question raised, but not decided, Whether, in a case where the alleged first husband had been aware of the second marriage in the manner proved, a court of justice, even if they felt themselves bound to decern in the declarator of marriage,

would decern in the conclusion of adherence, and the restitution of conjugal rights, either in relation to cohabitation or patrimonial interests?

3. Argued, but not determined, Whether the several interlocutors pronounced in the Courts below could have been deemed duly pronounced in proceedings to which the second husband and the children of the second marriage were not parties?

June 20. 1828.

1st Division, (Commissary Court), and Bill-Chamber.

Dr M'Neill, a Scottish clergyman, had a natural daughter, Mary Black, by a woman in a low rank of life. She was nursed by Christian Robertson, a porter's wife, in Simon-square, Edinburgh; thereafter resided with her mother, at whose death, in 1815, she took up her abode with her father, Dr M'Neill, then living in Leith-walk. At this period she was about 20 years of age.

Malcolm M'Gregor, a printer, had been married to Christian Robertson's step-daughter, but had lost his wife, and, it was said, had contracted an intimacy with Janet Nicolson, a niece of Christian Robertson, by whom, it was also alleged, he had several natural children. He was on terms of familiar acquaintance with Mary Black M'Neill,—had paid his addresses to her,—and she was in the habit of calling on him at the printing-office, (where he worked), sometimes alone, and sometimes accompanied by her father, twice or thrice a-week. M'Gregor was also on a very intimate footing with Dr M'Neill, and took an active management of the Doctor's affairs.

About the same time Mary Black M'Neill became acquainted with Robert Jolly, then studying medicine in Edinburgh; and he also became her suitor. This circumstance was known to M'Gregor. In April 1816 a friend asked him if Jolly and Mary were married? he answered, that they were not, but would shortly be so.

Dr M'Neill was proprietor of the estate of Stevenston, near Glasgow. On one occasion, in May 1816, he went with MacGregor and his daughter, in a post-chaise, to visit his property. When they arrived late at night at Holytown, the greater number of the beds happened to be taken down, as was the custom to be done once a-year. The landlady therefore informed M'Gregor and Mary, that, from the situation of her house at this time, she had only one double-bedded room to give them. M'Gregor said to Mary, that she need be under no apprehension of going into the same bed-room with him, as he would take her under his protection. In this arrangement she acquiesced, as her father, an old man, had already retired to rest in the only single-bedded room in the inn. But as there were no curtains on the bed designed for her, she insisted that sheets should be hung round it. Accordingly this was done; and M'Gregor and Mary slept in

the room. Next morning the parties left Holytown; went to Glasgow, and returned that same evening; but the apartments being now arranged, M'Gregor and Mary were accommodated with separate bed-rooms. There was no evidence attempted to be adduced of any celebration of marriage at Holytown. Very soon after reaching Edinburgh, Mary had some conversation with Margaret Kinlay about her (Mary's) marriage; but the bridegroom's name was not mentioned, although some marriage-clothes were given Margaret to make, and which were accordingly made and taken home. Margaret was invited to be bride's-maid, but was unable to attend. Sometime thereafter she asked Mary if she was married to M'Gregor, but Mary said 'No; I 'am going to marry a man I like better.' About the same time Christian Robertson asked M'Gregor, if he was going to be married to Mary, and he answered 'No: Dr M'Neill says he 'thinks I will be the man; but I think it will be Mr Jolly, for 'I know her pre-engagement to him.' June 20. 1828.

M'Gregor had introduced Mr Smyth, W. S. to Dr M'Neill, to be the Doctor's man of business; and accordingly Mr Smyth, in April 1816, drew two deeds of settlement of the Doctor's estate and effects, both in favour of Mary, and delivered them to Dr M'Neill. Soon after the journey to Stevenston, M'Gregor called on Mr Smyth, and invited him to be present at his marriage to Mary, at nine o'clock that evening. The marriage, he stated, was to take place at the Black Bull Inn, to be celebrated by a Mr Robertson, and to be private; which communication gave Mr Smyth surprise, as the fittest place for the marriage seemed to be the Doctor's own house, considering the share which M'Gregor possessed of the Doctor's confidence. Mr Smyth, being indisposed, could not accept the invitation, but offered to send his clerk. M'Gregor said he would call at nine, or half-past nine, for the clerk, and went away. But not coming at the appointed hour, the clerk proceeded to the Black Bull, and finding no person waiting there, returned, and mentioned the circumstance to Mr Smyth, who said he supposed the marriage had been put off to another day. Between a week and a month afterwards, M'Gregor called on Mr Smyth, and informed him that he had been married to Mary, in Edinburgh, by Joseph Robertson.

It appeared that on the 23d of May,* between nine and ten

* M'Gregor alleged, that on the 21st of the same month he had obtained from the session-clerk of the city of Edinburgh a certificate of proclamation of banns, in evi-

June 20. 1828. in the evening, M'Gregor (who occasionally staid with and slept at Dr M'Neill's house) and Mary proceeded from Dr M'Neill's house, and went to the house of the Rev. Joseph Robertson, minister of the Leith-wynd chapel. What passed there could not be proved by the evidence of Robertson, as the question which arose out of the circumstances under detail did not emerge until after he and a person named Pearson had been indicted for falsehood, fraud, and forgery, and clandestinely and irregularly celebrating marriage: on which a verdict had been returned, finding Robertson guilty of celebrating the clandestine marriage as libelled, and both pannels guilty of uttering, as genuine, counterfeit certificates of proclamation of banns, knowing the same to be counterfeited; and sentence had been pronounced, adjudging Joseph Robertson to be banished forth of Scotland from and after the 19th July 1818, never to return to or be found therein after the said day under the pain of death, in terms of the statute of King Charles II. c. 34. His wife, Margaret Robertson, and his daughter, Mary Robertson, were the only other parties present.

Margaret Robertson was accordingly examined as a witness in the action which was afterwards brought before the Commissaries; and 'being solemnly sworn, kneeling, with her right hand 'on the holy evangel, purged of malice, partial counsel, and good 'deed, and interrogated, Do you know Mary M'Neill, or Mary 'Black M'Neill, the person now pointed out to you in the 'Court? depones, and answers, I do not; I do not remember 'that I ever saw her before. Interrogated, Did your husband 'keep a record or book in which he entered the marriages 'celebrated by him? depones, and answers, He kept a book, in 'which, so far as I know, he generally recorded the marriages 'celebrated by him. And being shewn a book produced by 'the pursuer, and now subscribed by the deponent and Judge-'examinator as relative hereto, which commences on the 1st of 'January 1814, and appears to end on the 26th of November '1817; and the deponent being interrogated, Whether that is 'the book so kept by her husband, and by whose hand it is 'written? depones, and answers, It is the book that was kept by

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dence whereof (the lines themselves not being forthcoming) he produced this extract from the books of the session-clerk: 'Registrate of Marriage. *Edinburgh, 21st day 'of May* 1816.—Malcolm M'Gregor, printer, Old Church parish, and Mary M'Neill, 'St Cuthbert's parish, daughter of Dr James M'Neill, Edinburgh. *Edinburgh, 3d 'December* 1817.—Extracted from the Register of Marriages for the city of Edin-'burgh. (Signed) ROBERT BOW, S.C.'

'my husband, and is wrote by him. And being particularly desired to look at the entry in that book, under the date of twenty-third May eighteen hundred and sixteen, "Married Malcolm M'Gregor, printer, Old Church parish, and Mary M'Neill, St Cuthbert's parish, daughter of Dr James M'Neill, Leith-Walk.—Town Lines;" and interrogated, If that entry is in the handwriting of her husband? depones, and answers, Yes. Interrogated, Were you present at this marriage? depones, and answers, Yes. Interrogated, Do you know Malcolm M'Gregor the pursuer, now in the Court? depones, and answers, Perfectly. Interrogated, Did you know him before the marriage? depones, and answers, No; I did not. Interrogated, Have you been acquainted with him since the marriage? depones, and answers, No; I have not. Interrogated, How do you know him to be the person that was then married? depones, and answers, Indeed I know very little about it. I am very unable to answer questions to-day, I am so unwell.* Interrogated, Can you state any reason for saying he was the person who was then married? depones, and answers, I recollect his face, I cannot be more particular. He left a stick in our house that night. Interrogated, Did he come back for that stick? depones, and answers, I cannot recollect. Interrogated, Do you perfectly recollect that there was a marriage in your house, and celebrated in your presence by your husband, upon the 23d of May 1816, as specified in the book? depones, and answers, I recollect of it being, but I cannot recollect the precise date. Interrogated, About what hour did the marriage to which you allude take place? depones, and answers, Between nine and ten o'clock in the evening, I think; I cannot be certain. Interrogated, Did you see any marriage lines produced? depones, and answers, I know that they brought lines with them; I saw them in my husband's hands, either when he was celebrating the marriage, or before or after the celebration. He generally held the lines in his hand while he was celebrating marriages. Interrogated, Did you yourself read the paper that you call lines? depones, and answers, I really think I did, I believe I did. I knew Dr M'Neill a little. Interrogated, How does your acquaintance with Dr M'Neill lead you to recollect this circumstance? depones, and answers, I understood the woman married to be his daughter. Interrogated, Had

June 20. 1828.

* The witness's husband had that day been liberated from prison to prepare to go into banishment.

June 20. 1828. 'Dr M'Neill been in the deponent's house before this marriage? 'depones, and answers, He had sometimes, visiting my husband. 'Interrogated, Was any other person present at the marriage 'to which you allude? depones, and answers, Yes, Mary Robert- 'son, my husband's daughter by his first marriage. Interrogated, 'Did you see your husband give a certificate of this marriage? 'depones, and answers, No, I did not; he does not give certifi- 'cates unless when the lines happen to be lost. Interrogated for 'the defender, Did you hear the defender speak or say any thing 'at the time the ceremony was performed? depones, and answers, 'No; the woman married generally bows on such occasions, and 'does not speak. I suppose the woman then married did so, but I 'cannot recollect what she did. Interrogated, Did you hear the 'woman then married speak at all while she was in your house 'on that occasion? depones, and answers, No. Interrogated, 'Was it dark while she was in your house? depones, and 'answers, About the gloaming. Interrogated, Had you then 'candles lighted? depones and answers, I am not certain; I be- 'lieve there was a candle lighted. Interrogated, Did you hear 'the lines then read? depones, and answers, I did not hear them 'read. Interrogated, You before said, that you think you read 'the lines yourself. Are you now certain that you did read 'them, and when did you so read them? depones, and answers, 'I am not certain that it was the lines I read; but I either read 'the lines or the entry in the book about the time of the marriage. 'Interrogated, Was it before or after the parties had left your 'house that you read the lines or entry in the book, according 'to your recollection? depones, and answers, I really don't re- 'collect whether it was before or after. Re-interrogated for the 'pursuer, Did the parties, in the marriage to which you allude, 'conduct themselves in the ceremony in the same manner as 'parties usually do on similar occasions, or did you observe any 'thing particular? depones, and answers, They behaved just in 'the usual manner; I did not observe any thing particular. 'Re-interrogated for the defender, Was it your husband's prac- 'tice to put questions to the parties when he performed the cere- 'mony? depones, and answers, It was his practice to ask par- 'ties if they were willing. Interrogated by the Court, Have you 'any doubt he did so upon the occasion to which you allude? 'depones, and answers, None whatever.

Mary Robertson, on being interrogated, 'Do you know the 'defender? deponed and answered, I have known her by sight 'for several years, but I never spoke to her. And being shewn

'the book produced during the examination of the preceding wit- June 20. 1828
'ness, and interrogated, depones, That for more than fourteen
'years past her father recorded the marriages he celebrated; and
'the book produced, which she has now seen and examined, is of
'her father's handwriting. Interrogated, depones, That the entry
'under date the 23d May 1816, "Married Malcolm M'Gregor,
'printer, Old Church parish, and Mary M'Neill, St Cuthbert's
'parish, daughter of Dr James M'Neill, Leith Walk.—Town
'lines," is of her father's handwriting. Interrogated, depones,
'That the deponent was present at this marriage. Interrogated,
'Do you know the pursuer, Malcolm M'Gregor, now in Court?
'depones, and answers, Yes; I recollect the face; he was one of
'the parties then married: I did not know him before the mar-
'riage, nor have I been acquainted with him since. Interrogated,
'What hour did the marriage take place? depones and answers,
'Late in the evening, before supper. Interrogated, Was there
'any candle lighted? depones, and answers, No; I think there
'was not; I cannot recollect that there was any. Interrogated,
'Did you see any marriage lines? depones, and answers, I did
'not see any lines; but I asked my father if there were lines; he
'answered me, "That the pursuer had Town lines." I put this
'question before the ceremony was performed. I had not been
'present at any marriages for several years before, and had some
'delicacy about attending as a witness, which led me to put the
'question. Interrogated, Did you hear the names of the parties
'mentioned at the time the ceremony was performed? depones,
'and answers, I did not hear any names during the ceremony:
'I understood it was not common to mention the names in per-
'forming the ceremony. It struck me that the woman I saw mar-
'ried was Dr M'Neill's daughter, as I had often seen her walking
'with Dr M'Neill. After the ceremony was over, I asked my
'father if she was Dr M'Neill's daughter, and he told me she was.
'Interrogated, If the defender, whom she now sees in Court, was
'the person then married? depones, and answers, She was; I
'have no doubt she was the person. Interrogated, depones,
'That the deponent had often before been present at the celebra-
'tion of marriages, and the marriage in question was celebrated
'in the usual manner, and solemnly and deliberately. Interrogat-
'ed, Did you hear the defender speak while she was in your
'father's house on that occasion? depones and answers, No, I
'did not. Interrogated, depones, That the ceremony was per-
'formed at her father's house in Carrubber's Close, and the
'parties only remained there while the ceremony was perform-

June 20. 1828. 'ing; that is to say, it was performed when they came, and they 'went away when it was over. Depones, That the deponent and 'her step-mother were the witnesses, and there was no other per-'son present but the parties and the deponent's father. Inter-'rogated, depones, That the deponent knew Dr M'Neill since 'she remembers any thing, and he frequently visited at her 'father's house.'

The record of marriages produced on this occasion contained above a thousand different entries of marriages, in regular order of date, with the exception of fifty-three entered separately upon five leaves at the end of the book, and were marked as omitted in their places. The whole, except one entry, and the names of the witnesses, appeared to have been written by one hand. The entry of the marriage between Malcolm M'Gregor and Mary Black M'Neill, was in its proper place.

M'Gregor and Mary returned to Dr M'Neill's house, where they slept, M'Gregor alleging he there consummated this marriage. This, however, Mary denied, averring, that they slept in different bed-rooms; and at this time it appeared that M'Gregor usually slept at Dr M'Neill's. The husband of Dr M'Neill's housekeeper, and who was also in the habit of occasionally residing in the house, deponed, that he never saw M'Gregor and Mary in a bed-room together in Dr M'Neill's house but once; on which occasion, a Sunday morning, about seven or eight o'clock, the deponent went with M'Gregor into a bed-room where Mary was, and he saw M'Gregor shake hands with Mary, and they bade each other good-morning: That it did not consist with his knowledge that M'Gregor and Mary slept together at any time in Dr M'Neill's house, nor did he ever hear any person say so except M'Gregor, who told him that he had slept with Mary. And being particularly interrogated by the Judge-examinator to consider the great oath that he had taken, he deponed, that he had never seen the parties in bed together, nor does it consist with his knowledge that they ever were so. Another witness (Craig) deponed, that being employed on the 24th May 1816, (the day after the ceremony at Joseph Robertson's), in removing to Dr M'Neill's the furniture of one of the Doctor's tenants, M'Gregor came to take the inventory, and Mary came down also. M'Gregor handed her a bunch of notes, and asked her, "Will that do?" she answered, "It would," and thanked him. They shook hands together at the tenant's that morning.—About 10 or 11 o'clock after breakfast, Mary said, "I am glad to see you this morning, Mr M'Gregor." No evidence arising from signs and appearances,

generally resorted to in cases of disputed consummation, was led, or attempted to be led, nor was the housekeeper examined on this point. June 20. 1828.

At this time Jolly's visits to Mary had not been discontinued, although it rather seems that they were, occasionally at least, private.

Jolly's residence was in the parish of Edinburgh—Mary's in the West Church—although, from being on the extreme boundary, next South-Leith parish, mistakes might have been innocently committed in that matter. On the 13th of June 1816, he went to the session-clerk's office of South-Leith, and obtained this certificate: 'Leith, 13th June 1816.—Robert Jolly, student 'of medicine, Edinburgh, and Mary M'Neill, residenter, Leith 'Walk, and daughter of Mr James M'Neill, portioner there. 'That the parties are free, unmarried, of legal age, &c. is at-'tested by John Gibson for John Foggie, sess.-clk.' But no actual proclamation of banns had taken place. Then, in company with Mary, Dr M'Neill, the housekeeper and her husband, they proceeded in a hackney-coach to the residence of the Rev. Dr James Robertson, who had been applied to in the morning to come to Dr M'Neill's house, and had been shewn the certificate of proclamation, but who, not being able to go, appointed the evening (about half past seven o'clock) for the ceremony.

Dr M'Neill was very feeble in his limbs, and much given to intoxication; but although it was attempted to be proved, that at this time he was so drunk as to be carried, or rather dragged to and from the coach, the evidence of that fact failed, and indeed was satisfactorily contradicted.

On reaching Dr James Robertson's house, Jolly handed out Dr M'Neill, and was followed by Mary and some of the domestics. The Doctor walked up the first flight of ten steps, with his arm in Jolly's, without any apparent difficulty. When Dr Robertson came into the room, Dr M'Neill rose slowly, and hoped that Dr Robertson would excuse an old man, who, by reason of some infirmities, was unable to rise so readily, and make so polite a bow as he was accustomed to do in his younger days. Dr Robertson requested him to be again seated; he answered, 'No; I have come to give away my daughter to Mr 'Jolly, and I must do so in the usual manner;' on which he stepped forward, took her by the hand, and placed her near Mr Jolly. Immediately thereafter, Dr Robertson, addressing Mr Jolly, asked him, 'Do you take this woman, (they having joined hands), whom you have by the hand, to be your lawful married

June 20. 1828. wife; and do you promise, before God and these witnesses, to be a faithful and loving husband to her, till God shall separate you by death?' Mr Jolly replied, 'I do.' 'He then said to the bride, Do you take this man, whom you have by the hand, to be your lawful married husband, and do you promise to be a faithful, a loving, and a dutiful wife to him, till God shall separate you by death?' and the conclusion was, 'Before these witnesses I declare you married persons; and whom God in his good providence has thus united, let no man put asunder.' He then offered up a prayer, gave the parties a few exhortations, and concluded with thanksgiving; in all which Dr M'Neill seemed to be much interested, and requested the parties to remember the exhortation, and to act accordingly. Dr Robertson said, he hoped he, the Doctor, would be kind to the young couple; to which he replied, 'Sir, I have been kind to them, I will be kind to them still; and nothing shall be wanting on my part to make them happy.' Dr Robertson then certified the marriage on the lines of proclamation, by the words,—'The above-designed 'parties were married before witnesses, by James Robertson, 'minister;' and gave the certificate to the bride, (as was always his practice). Dr M'Neill's housekeeper and a bride-man were present. When the ceremony was over, Dr M'Neill, with great affection, wished Mr and Mrs Jolly much happiness, and the parties then went away. The marriage was entered in the Register for Marriages for South-Leith.

Mr Jolly proceeded with his wife to Dr M'Neill's house, and from that hour took up his permanent residence there, and lived with her at bed and board as her husband. M'Gregor congratulated them on their marriage; drank to their healths as married persons, by the names of Mr and Mrs Jolly; called and inquired for them as such; told of their marriage, and shewed gloves, which he said he had got from them; received them as visitors in his pew at church, and after service walked away with them; heard other people address them, and drink to their healths as Mr and Mrs Jolly; and heard her called so to himself, without objecting to the appellation.

It happened that Dr M'Neill required to be again at Stevenston; and, in October 1816, took with him Mr and Mrs Jolly, and M'Gregor. They proceeded to Holytown, and remained two nights there. Mary Hastie, the landlady's daughter, attended table, and deponed, that she heard M'Gregor recognize the defender as Mrs Jolly, and he drank to her health as such, and so behaved all the time they remained in the house.

During these two nights, there not being separate accommodation, Mr and Mrs Jolly and M'Gregor all slept in the same bed-room; and it being a double-bedded room, Mr and Mrs Jolly (as the witness understood) slept together in one of the beds, and M'Gregor in the other, the only other room being occupied by the Doctor. June 20. 1828.

In settling with the Doctor's tenants on this occasion, M'Gregor gave his assistance, and, without objecting, heard them drink to Mrs Jolly's health, and address her by that name.

On the death of Dr M'Neill, in May 1817, M'Gregor went to the Doctor's house, then occupied by Mr and Mrs Jolly, and desired to render himself useful to them; remained present at the chesting; and made an apology to them for being obliged to go away sooner than he could have wished. He also, with some other persons, accompanied Mr Jolly to the house of Mr Smyth, the Doctor's man of business. Mr Smyth requested M'Gregor to produce Dr M'Neill's deeds of settlement—saying, 'You have the deeds, I believe:' On which he pulled them out of a side-pocket in his breast or coat, and they were read to the persons present, and were left in Mr Smyth's possession; after which, Mr Jolly and M'Gregor went away arm-and-arm. At the funeral, Mr Jolly acted as chief-mourner. M'Gregor's step-mother (who had nursed Mary) went to the Doctor's house on the night of his death; and, on expressing a wish to get early home, M'Gregor requested her to stop for two or three days. She asked, 'Shall I stop with Mrs Jolly?' to which he answered, 'Yes.' At this time he was very much in the house, and seemed to take a charge in advising Mr Jolly as to the funeral arrangements; but Mr and Mrs Jolly invariably appeared as master and mistress of the family, and he was considered in the light of a visitor there merely. He accepted mournings from Mr Jolly; and on the evening of the funeral, when several people were present at the Doctor's house, he recognized Mary as Mrs Jolly, and repeatedly drank her health as such, along with the rest of the company. When he first came into the room, he congratulated Mrs Jolly as the lady of Stevenston; and on the following Sunday accompanied Mr and Mrs Jolly to the church to be kirked, and returned and dined with them.

On the other hand, one witness represented Mr Jolly's visits after his marriage as 'hidling;' that he had on one occasion come to the Doctor's house, and Mary having opened the door, he pulled off his shoes, and went on his stocking-soles to the

June 20. 1828. garret, where he remained three days and three nights. But this witness's testimony seemed entitled to little credit. Another witness, who had been asked to take charge of the Doctor's house during the celebration of the marriage with Mr Jolly, deponed, That some time after that period, Dr M'Neill, Mary, and M'Gregor, came into the house together from Edinburgh, and went into the dining-room. While they were there, Mr Jolly called; she opened the door to him, and he walked up stairs. The witness could not positively say, but rather thought he previously took off his shoes. She went into the dining-room to tell the parties that the kettle was ready for tea, and addressed Mary by the name of 'Mrs Jolly;' who seemed much offended at the witness for doing so, and exclaimed in an angry tone, 'Mrs Devil.' On the same evening M'Gregor went up stairs, and called up the housekeeper and the witness, and asked them whether it was possible that Mary was married to Mr Jolly? The housekeeper answered, that it was not only possible that they were married, but that it was proveable; for that she herself had been present on the occasion. M'Gregor seemed very sorry after receiving this information, and repeated the words, 'Was it possible!' Patrick Neill, a printer, with whom M'Gregor worked, deponed, that in the beginning of June 1816, he was informed by M'Gregor of his marriage to Mary, and requested to call upon her with him. The witness called about the middle of July: they were cordially received by Mary, who shook his hand. Upon the Doctor coming in, he went up to M'Gregor, and took one of his hands in both of his, shaking hands with him in a fondling manner; and on his mentioning the witness's name to him, the Doctor politely came up to the witness, and shook hands and conversed kindly with him. Nothing was said about the marriage of the parties. Witness invited Dr M'Neill and the parties to come to his house, and they accepted. Before coming away some spirits and water was brought into the room; witness drank Mary's health by the name of "Mrs M'Gregor." It was the only opportunity he had of shewing the object of his visit, which was to visit them as a new-married couple. She returned the salutation, and drank the witness's health. And John White, lapidary, deponed, that in June 1816, M'Gregor, with whom he had been long acquainted, came with Dr M'Neill and Mary to the witness's shop, and got three gold rings, and a brooch of Ayrshire jasper, which M'Gregor had bespoke, and for which he paid the witness. When the jasper brooch was delivered, Dr M'Neill said to M'Gregor,

" This will cost a great deal of money; but it does not signify, it will be all your's." There was a glass of rum handed on the occasion (the parties being in the witness's room); witness drank to Mary, saying, " Mrs M'Gregor, your health;" she said nothing, but also drank to witness. While the rings were making, Mary came to the shop with M'Gregor, and tried a ring upon her finger, to see if it would suit. In June witness made a gold brooch of a Brazil-stone, by M'Gregor's order, as he said, for Mary. Witness also furnished, by his order, a stone for the head of a cane, which he said he was to present to Dr M'Neill. June 20. 1828.

Mr and Mrs Jolly continued to live together as man and wife, were recognized as such, and continued to receive as such the visits of their friends, and of M'Gregor.

In March 1818, M'Gregor raised in the Commissary Court of Edinburgh a summons of declarator of marriage and adherence against Mary Black M'Neill, subsuming 'that an intimate 'acquaintance having for some time subsisted betwixt the pur-'suer and Mary M'Neill, sometimes called Mary Black M'Neill, 'the reputed natural daughter of the late Dr James M'Neill of 'Stevenston, by Euphemia Black, sometime residing in Car-'negie-street, Edinburgh, they formed an attachment, and 'agreed to become husband and wife of each other; and accord-'ingly, when they were together at Holytown, in the county of 'Lanark, in spring 1816, on a jaunt in company with the said 'Dr James M'Neill, an irregular marriage between them was 'celebrated by the said Dr James M'Neill, and their marriage 'was consummated by their spending several nights together in 'the same bed at Holytown aforesaid: That on the pursuer and 'the said Mary M'Neill, or Mary Black M'Neill, returning to 'Edinburgh from said jaunt, which they did in the month of 'May 1816, they considered it proper that no time should be 'lost in celebrating in facie ecclesiæ that marriage which had 'been irregularly contracted between them at Holytown afore-'said; and accordingly they were, in the month of May 1816, 'regularly married by the Rev. Joseph Robertson, minister of 'the Chapel in Leith-wynd, Edinburgh. Notwithstanding of 'all which, the said Mary M'Neill, or Mary Black M'Neill, 'casting off the fear of God, and forgetting her natural and 'Christian duty, and promise made at her entering into said 'marriage with the pursuer, now refuses to acknowledge her 'marriage, or to cohabit with him as her husband;' and concluding, that 'therefore the pursuer, Malcolm M'Gregor, ought 'to have our sentence and decreet, finding and declaring that

June 20. 1828. 'he and the said Mary M'Neill, sometimes called Mary Black 'M'Neill, defender, are lawful married persons, husband and 'wife of each other; and decerning and ordaining the said de- 'fender to adhere to and cohabit with the pursuer, and treat and 'entertain him in all respects as her husband; and further de- 'cerning and ordaining the said defender to make payment to 'the pursuer of the sum of L.100 sterling, as the expenses of 'this process, or of such other sum, less or more, as the ex- 'penses shall amount to, besides the expense of extracting the 'decreet to follow hereon.'

This summons was executed against Mary Black M'Neill, who lodged defences, (May 1. 1818.), entitled 'Defences for 'Mary Black M'Neill, spouse of Robert Jolly, surgeon.' 'That 'the pursuer was intimately acquainted with Dr M'Neill, and 'accompanied the defender and him to Holytown, in spring '1816; but there is no truth in the allegation, that a marriage 'was there celebrated by the Doctor; and she expressly denies, 'that she either then, or at any other period, consented to become 'the pursuer's wife. The pursuer, some time in the month of 'May 1816, made proposals of marriage to her, which she re- 'jected, informing him, at same time, that she was pre-engaged 'with Mr Jolly, her present husband. Notwithstanding, some 'short time thereafter, the pursuer called at Dr M'Neill's house 'betwixt ten and eleven o'clock at night, by which time the 'Doctor had retired to his bed-room; and by means of threats, 'particularly of personal injury to Mr Jolly, he prevailed upon 'her, or rather forced her, to accompany him to Edinburgh, 'and carried her to a house, which she afterwards understood 'was that of Joseph Robertson; and though, from the agitation 'of mind at the time, she could pay no attention to what might 'then pass, yet she is convinced that in no situation would she 'consent to marry the pursuer, or break her engagement with 'Mr Jolly, to whom she was sincerely attached, and resolved to 'marry. The pursuer made an apology for the impropriety of 'his conduct, requested that she would be under no uneasiness, 'and said that, with regard to a marriage, he would think no 'more of it; and as neither party wished the above circumstance 'to be made known to Dr M'Neill, so the pursuer's apology 'was accepted of: and the defender having a short time there- 'after been married to Mr Jolly, the pursuer was on that occa- 'sion presented with, and accepted of gloves, as one of their 'friends and well-wishers, and frequently thereafter visited them 'in the Doctor's house, where they lived both during the Doc-

'tor's lifetime and after his death, and he only discontinued his 'visits from the month of December last.' June 20. 1822.

Thereafter M'Gregor required the Commissaries to appoint the defender to be judicially examined as to what passed on the 23d May 1816, which the Commissaries allowed; but he afterwards passed from his motion.

He then condescended, and offered to prove,—

"1. That having paid his addresses in the way of marriage to the defender, who was living unmarried in the house of her reputed father Dr M'Neill, with the approbation of the said Dr M'Neill, the pursuer accompanied Dr M'Neill and the defender in an excursion to Lanarkshire, in the month of May 1816, for the purpose of visiting an estate belonging to Dr M'Neill in the parish of Bothwell. 2. That in the course of this excursion the parties slept several nights at the inn at Holytown, which is in the same parish with Dr M'Neill's estate; and while in that inn, Dr M'Neill stood up, and solemnly bestowed the hand of his daughter the defender upon the pursuer as her husband, and gave the parties his blessing. That the defender acquiesced in this by taking the pursuer's hand; and while at the inn at Holytown, the pursuer and the defender slept in the same room for two nights, when the irregular marriage, which had been previously solemnized by Dr M'Neill in the way here mentioned, was consummated. 3. That, while upon this journey, the pursuer was treated by the defender and by her father in such a way as induced the tenants on Dr M'Neill's estate, and others in whose company they happened to be, to believe that the pursuer and the defender were either actually married, or were solemnly betrothed to each other as husband and wife. That the parties returned from this excursion to Edinburgh on the 20th May 1816; and the defender, after her return to her father's house in Leith Walk, where she generally resided, admitted to various persons that an irregular marriage had been solemnized between the pursuer and the defender at Holytown, when she had accepted the pursuer as her husband; and that this irregular marriage had been afterwards consummated. 4. That, immediately upon their return to Edinburgh, the pursuer and defender thought it proper that their marriage should be regularly solemnized by a clergyman without any further delay; and with the view to this marriage the defender made the usual preparations, in the way of dress, which are customary on such occasions. 5. That, in pursuance of this resolution, the pursuer obtained a certificate of proclamation of banns in the usual form; and thereafter the

June 20. 1828. pursuer and the defender proceeded, on the evening of Thursday the 23d of May 1816, from Dr M'Neill's house, near the bottom of Leith Walk, to the house of the Reverend Joseph Robertson, minister of the Chapel of Ease in Leith-wynd, Edinburgh, for the purpose of having their marriage regularly solemnized by that person. That upon arriving at Mr Robertson's house, they made application to him to solemnize the marriage, producing to him at the same time the certificate of the proclamation of banns; and they were accordingly that evening regularly married by Mr Robertson, according to the forms of the Church of Scotland, in the presence of Mr Robertson's wife and his daughter; and the marriage was entered in a book kept by the said Reverend Joseph Robertson, as a record of the marriages which he solemnized. 6. That, after the marriage was thus solemnized, the pursuer accompanied the defender from Mr Robertson's house to the house of Dr M'Neill, in Leith Walk, and there the marriage was consummated by the pursuer sleeping in the same bed with the defender. 7. That the defender has, upon a variety of occasions, admitted to sundry persons that she was married to the pursuer by the Reverend Mr Robertson, as above-mentioned, and that she thereafter slept with the pursuer as her husband in her father's house."

The defender in answer "called to the Commissaries' attention, that she had stated in her defences, that so far from Mr M'Gregor having had any idea that she was his wife, he, on the contrary, not only knew of the previous courtship betwixt Mr Jolly and her, and that they were to be married, but at the time of the marriage he was presented with gloves, which he accepted of; and being considered as one of their most intimate friends, he repeatedly visited them, drank to them as husband and wife by the names of Mr and Mrs Jolly, and during these visits was in the practice of partaking of their family fare, always acknowledging them to be husband and wife. When, however, the pursuer first pretended to say that the respondent was his wife, it appeared that his object was merely selfish, as he offered to renounce the claim of a husband, upon condition that she and Mr Jolly would pay him a sum of money; so that, if they had complied with his wish, no such action as the present would have appeared in Court.* The defender therefore submitted, that before the

* The pursuer thus described (in his pleadings) his discovery of the intimacy of Mr and Mrs Jolly, and its effect upon him. "The pursuer, after consummating his marriage with the respondent at her father's house, where it was agreed she should remain

pursuer was allowed to enter upon his proof of the condescendence, the above special facts should be discussed, and a proof thereof allowed to the defender; or, if the pursuer is to proceed with his proof in the mean time, the defender should also be allowed a proof of what she had now stated, and of the answers to the articulate condescendence; namely,—1. The defender denies this article, excepting in so far as regards the circumstance of the pursuer's having accompanied Dr M'Neill and the defender, first to Holytown, and afterwards to Glasgow. 2. and 3. These articles are denied. 4. This is denied, in so far as regards the defender's having any view of a marriage with the pursuer, making preparations on that account. 5. The defender recollects, that some time in May 1816 the pursuer made proposals of marriage to her, which she declined, informing him of her being pre-engaged with Mr Jolly, now her husband. Notwithstanding of this, some short time thereafter, the pursuer called at Dr M'Neill's house one evening about nine or ten o'clock, by which time he had retired to his bed-room, and by means of threats, particularly of personal injury to Mr Jolly, the pursuer prevailed on her to accompany him to Edinburgh, and he conducted her to a house, which she afterwards understood to be that of Joseph Robertson; and although, from the agitation of her mind at the time, she was incapable of paying attention to what then passed, she is convinced, that neither then, nor at any other time, did she consent to marry the pursuer, or break the engagement she had come under with Mr Jolly. 6. The defender admits that the pursuer accompanied her back from the house of Joseph Robertson to Dr M'Neill's house, where she retired to her own room, and the pursuer staid all night in a separate room below; but there is no truth in his allegation of there having been any marriage, or consummation of marriage, June 20. 1828.

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on account of the old gentleman's ill state of health, continued to see her there during the day, when leisure permitted his absence from his business, and sleeping with her generally, though not always, at night. But this did not continue long. Not very many days after his marriage, the pursuer having occasion to pass one forenoon by Pilrig-street, was amazed to meet his wife hanging upon the arm of Mr Jolly, and conversing with him, seemingly on the most familiar terms. Astonished at this instance of levity, the pursuer abruptly accosted them, by charging Mr Jolly with an improper intimacy with his wife. What the particulars of the conversation which then took place were, the pursuer does not now recollect; the result, however, was, an acknowledgment by them of their guilt, and a determination on the part of the pursuer, to take instant measures for obtaining a divorce against his unfaithful wife; and from that time all intercourse between them as married persons ceased."

June 20. 1828. betwixt her and the defender, either then or at any other period. 7. This article is denied.

A proof was led of these facts and circumstances, including a conversation which M'Gregor averred Mrs Jolly had held one evening in the house of her nurse, Christian Robertson; but no proof was at this time taken of the marriage at Dr James Robertson's, nor of the practice relative to the certificates on which the clergymen in Edinburgh were in the habit of marrying parties. From the proof relative to the above conversation it appeared, that Christian Robertson's daughter and her husband were present, and that Mrs Jolly sent for Janet Nicolson, the alleged mistress of M'Gregor, who came to the house, and on her arrival some conversation passed. Janet deponed, that Mrs Jolly stated that she had been married to M'Gregor at Joseph Robertson's, but she could by no means think of living with him:—That she preferred Mr Jolly, and would lay down her life for him:—That she asked her, whether she, Janet, was not married to M'Gregor? to which she answered, that Mary was married to him:—That she was urged to confess that she had been so, but she had never confessed it to Mary, to Jolly, or any other person, although she had been urged to do so:—The parties joked each other about livery, *i. e.* wedding-favours:—Mrs Jolly then said, that Malcolm (M'Gregor) had come down to Dr M'Neill's house, and told her to come up to Mr Bridges to settle some business:—When they were on Leith Walk, Malcolm advised her to go into one M'Farlane's in Carrubber's Close to get a bottle of ale:—She was against going, but he insisted upon it:—When they went there, they found the house shut up:—Malcolm then asked her to go to Joseph Robertson's, which was just opposite:—He insisted on her going up, and said he would employ one M'Donald to stab Mr Jolly, or assassinate him; and would burn the deeds of her property, of which deeds he had the custody at the time, if she did not go:—She did not know where she was when she went in:—Mr, Mrs, and Miss Robertson were at home, the two latter darning stockings:—Mr Robertson said, 'It was a very late hour to come there:'—Malcolm took out a pocket-book and gave him either one or two notes, and he made no scruples after that:—He said, 'Where had such 'an old man as the pursuer got such a young lassie?'—Mary said, in presence of the witness, that she did not consider this marriage was binding; and asked, 'what would two or three words of an outlawed man do?'—Afterwards, M'Gregor went home; and she went to Dr M'Neill's, and slept there:—Next

day, she and Dr M'Neill went up to the printing-office, and asked a word of M'Gregor, when Dr M'Neill told him, that Mr Jolly was a far better marriage for Mary:—That he (the Doctor) would not consent to her marrying M'Gregor, nor let him go home with them:—M'Gregor asked her to meet him in Murray-street, Leith, on the Sabbath, which she did; and took with her Mr Jolly, who asked M'Gregor if there was any thing betwixt Mary and him except the marriage-lines of Joseph Robertson? to which he answered, that there was not:—He desired her to take and burn them, and wished Jolly and her all happiness.* June 20. 1822.

On advising the proof and memorials, the Commissaries, on 1st June 1821, found, "that the pursuer has established, by sufficient evidence, that a marriage was celebrated betwixt the defender and him, by the Rev. Joseph Robertson, late minister of the Chapel in Leith-wynd, Edinburgh, in the month of May 1816: that the defender has failed to establish by evidence, any circumstance sufficient to elide the legal presumption thence arising, of the matrimonial consent having been duly adhibited by her on that occasion; and, therefore, found facts, circumstances, and qualifications proven, relevant to infer marriage between the parties; and declared them married persons accordingly, and decerned." And thereafter, on the 7th December 1821, on advising a reclaiming petition, the Commissaries adhered, and found "that no circumstances have been attempted to be proved, on the part of the defender, from which to infer intimidation, as averred by her: that the inference of the defender's matrimonial consent, arising from the marriage ceremony at Robertson's, is strengthened by the defender's admission, that the pursuer accompanied her back from Robertson's to her father's house on the same evening; and that a presumption thence arises of sexual intercourse having followed betwixt the parties, which is further confirmed by what passed at White's, the lapidary, some time thereafter: and that the inference of the defender's matrimonial consent is not con-

* In the absence of these lines, M'Gregor produced, in modum probationis, a certificate of the marriage of the parties, under the hand of Joseph Robertson:—'Edinburgh, Carrubber's Close, 29th May 1816.—These are to certify, that Mr Malcolm 'M'Gregor, printer, and Miss Mary M'Neill, after producing regular marriage-lines 'from the session-clerk of the city, were married, before witnesses, by me. (Signed) 'JOSEPH ROBERTSON, minister.' The defender objected, that Joseph Robertson not being an admissible witness, no certificate under his hand, especially holograph, could be admitted, as the same objection that applied to his testimony applied to his certificate. Answered for pursuer,—The certificate had been given recently after the ceremony, and long before the sentence of the Court of Justiciary against Robertson. The certificate was allowed to be produced, reserving all objections.

June 20. 1828. tradicted by any part of the pursuer's conduct immediately following the marriage ceremony; and that, although his conduct at a subsequent period may import his willingness to relinquish his legal claims to the defender as his wife, such conduct cannot destroy the legal effect of the evidence adduced to establish the validity of the previous union of the parties."

A bill of advocation was then presented by Mary M'Neill, which was reported by the Lord Ordinary, on memorials, to the First Division; and on advising the case,—

* *Lord Hermand* said,—I have gone over the proof in this case, but I find that the pursuer has brought forward no legal evidence of his marriage with the defender, Mrs Jolly; and I also find plenty of evidence, arising from the conduct of parties, to convince me that a marriage was not seriously contemplated. Perhaps, from being aware of this, the pursuer has chosen to rest his case on the point of law; and I agree with him so far, that (if there had been a marriage) no such thing as a voluntary divorce could have been available,—indeed such a thing was never heard of. But, in this case, there was no marriage. What is called a marriage was nothing more than a mock celebration of that solemn ceremony by a person of the name of Joseph Robertson, who was nothing else than a manufacturer of marriages, and has, since the period in question, been banished from this country for immoral practices. There is, to be sure, a somewhat rash admission proved to have been made by the defender; but still I do not see that this amounts to complete evidence of a marriage,—for threats had been used in order to effect it. The pursuer states, that he had obtained the consent of Dr M'Neill to the marriage; but the inference which I would draw from his conduct leads me to conclude, that he neither had the Doctor's consent, nor that of Mrs Jolly. He never claimed the privileges of a husband; but this would not have been enough to dissolve the marriage, if there had been one. Here, however, as I said before, there was no marriage. It was all a pretence. Can it ever be supposed that the pursuer would have conducted himself as he did, if there had been any such thing? He knew of Mr Jolly's marriage,—he was in the custom of visiting him,—he dined and drank tea with him and Mrs Jolly; nay, he even drank the healths of Mr and Mrs Jolly; and now, at this distance of time, he comes forward and

* These are the opinions laid before the House of Lords.

claims her as his wife. In such circumstances, the attempt even to infer that there was a marriage is both criminal and absurd. June 20. 1828.

Lord Balgray.—I think this a case of extreme nicety, and have had difficulty in forming my opinion. At same time, I am inclined to concur with Lord Hermand. I am quite clear, that consensus, non concubitus, facit matrimonium; a marriage in facie ecclesiæ, and one less regular, will make no difference in point of law, if the deliberate consent of parties has been given. The more solemn ceremony by a clergyman is merely considered as a matter of order; and where the marriage has been so performed, there is a greater chance that the parties have understood the nature of the contract, and have deliberately assented to it. In such a case the consent is held to be more certain; but as the law is laid down by Lord Stair, it is not essential,—the essence consists in the deliberate consent. To discover whether there was here a marriage or not, it is necessary to inquire into the conduct of parties at the time it is said to have happened, as well during the previous as during the subsequent period; and upon a review of the manner in which they conducted themselves during these three periods, I do not see that I am warranted in concluding that a deliberate consent was given by the defender. From Mrs Robertson's evidence, no consent has been established. She seems to have known little about it, and swears that the lady did not speak. Now, in a case like this, every minute particular is of importance. Mrs Robertson's evidence is confirmed by that of her daughter. The parties bolted in upon Mr Robertson at half-past nine, on a summer evening, and the ceremony seems to have been over in a few minutes; when one, or two, pound notes were thrust into Mr Robertson's hand. So hurriedly was this most important of all ceremonies gone about, that the pursuer went off, leaving his stick behind him. Upon such an occurrence as that of his marriage, the pursuer should have called upon some unexceptionable witnesses to be present; —it was his bounden duty to have done so, in order to shew that every thing was proper, fair, and correct. The want here is, that there was no consent: the irregularity of the ceremony might have been got over, had that requisite ingredient been obtained. As to the plea, that the proclamation of banns proves the marriage, I hold, that a regular proclamation cannot be traversed. But if the proclamation contains, on its own face, evidence of falsification, what credit can you give it? Now, in the present case, this document bears a nullity on the very face of it, and it must be kept out of view. I would do the same thing

June 20. 1828. with a charter under the Great Seal, or any other seal, in such circumstances. The certificate was taken out on the 21st of the month, and the parties were married on the 23d; therefore, what it sets forth could not by possibility be correct. Lord Bankton says, that a marriage is regularly solemnized, when the ceremony is performed by a clergyman, after proclamation of banns for three successive Sundays. If any of the parties belong to the Episcopal persuasion, the ceremony should be performed both by the clergyman of the Established Church, and by the Episcopal clergyman; and where the parties reside in different parishes, the banns must be proclaimed in both of these parishes: and marriages celebrated in this way, are considered as legal and regular marriages. But I do not say, that these forms were at all requisite, if consent had been deliberately given in a less ceremonious form, as where the parties declare before a Justice of the Peace, &c. The certificate of the session-clerk, which seems to have been obtained for a matter of 5s., is not to be held as a certificate of marriage. It is an ingredient in the circumstances of the case, that here the marriage was clandestine; and it has not been pointed out in the proof, that the woman gave her consent, and that she deliberately accepted of M'Gregor as her husband. No such thing appears in evidence; and as this is the most essential of all contracts, without such consent there can be no marriage. Even in a bargain regarding moveables, I would not hold that there is proof (arising out of what took place on the present occasion) sufficient to authorize the party to insist upon implement of the bargain. The conduct of parties, both before and after the sham ceremony, proves that they themselves did not consider that there had been a marriage in contemplation. The tea-drinking parties with Mr Jolly prove, that M'Gregor himself was particularly aware of this. I will not repeat the scene at Holytown on 16th October 1816, as your Lordships are aware of it from what is stated in the printed papers.

Lord Gillies.—I am for farther investigation:—The case is both difficult and important. It is as difficult in point of law, as it is important in its consequences to the parties. I have no great respect either for M'Gregor the pursuer, nor for Mrs Jolly; but the interests of the family procreated of the marriage with Mr Jolly must be attended to. In whatever light the conduct of the other parties may be viewed, they, at least, must be held to be innocent. On the one hand, we have a regular celebration of a marriage, although it was not regularly proclaimed.

But this I hold to be immaterial; for, if marriages were to be celebrated according to Lord Bankton's doctrine, I may venture to say, that few individuals have been regularly married during the last century. I think the regular celebration by a clergyman not of essential consequence, although, for the sake of order, it is the most preferable mode, since the presence of a clergyman may be supposed to prevent parties from being mistaken. What was the situation of parties in this case? The woman was about twenty-six years of age,—the man much more. They were both persons of full age; and it is difficult for me to think, that they did not both understand the nature of the contract into which they were entering. Therefore, whether the ceremony was regular or not, I agree with Lord Balgray, that consent was necessary. But the case has not been fully investigated. The Commissaries should have allowed Mr Jolly to prove his marriage. It is said by M'Gregor, that Dr M'Neill approved of his marriage: this I cannot believe. If the Doctor had done so, why was he present at Jolly's marriage? I should like to know M'Gregor's situation as to the custody of papers and title-deeds. Why did the Commissaries shut out the proof of this? There is no proof of concubitus. The Commissaries said it must be inferred. Why leave it to inference, when proof might have been obtained? There were more persons than one in the house. Why not examine the woman who acted as Dr M'Neill's servant? It is strange, that the husband should have been examined, while the wife was not. But there is a point which has not been hinted at by the Judges who have spoken. I mean the bar to the action, arising from the personal objection against the pursuer. No man is expected to criminate himself; but I think the pursuer has been guilty of such a delinquency, in countenancing Mr Jolly's marriage, as to bar him, personali exceptione, from insisting in the present action; which, as a man and a Christian, he should have objected to, and prevented. Instead of doing so, he allows matters to proceed with his entire acquiescence; and he afterwards comes forward, and seeks to bastardize the children, who, on all hands, must be held to be innocent. I do not know, however, that he can do so. Suppose he had, on the 16th June, married another woman, by whom he had issue,—Would he have been entitled to come forward, and insist that the second marriage should be dissolved on account of the previous one? I think not; and I can see no difference between the two cases. Or, take the case, that there shall be a report of the death of a first husband,

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June 20, 1828. and, on the belief of that report, that the woman enters into a second marriage, of which children are procreated; I do not think that the reappearance of the first husband could bastardize the children of the second marriage. If so, I should like to hear some further argument on this subject; and I think there is much room for further proof.

Lord Succoth.—I am disposed to do as Lord Gillies has suggested. Before we pronounce even our first interlocutor, we should get more light on the subject, as the case is so important and so difficult. Indeed I may say, it is the most difficult which has occurred since I sat on the Bench. The points to which his Lordship alluded should be fully investigated. The maxim is, consensus non concubitus facit matrimonium; and the question here comes to be, Was there a deliberate consent? The marriage was completed facie ecclesiæ. It is difficult for me to suppose, that a woman, twenty-six years of age, brought before a clergyman, as was the case here, did not give her consent. Being in presence of the clergyman, consent must be implied. She may, however, have had an after-thought. She may have repented; but that is of no consequence. The question is, whether her going there, and permitting the ceremony, is not legal evidence of her adhibiting her assent. She could not have gone there by mistake: it is pretended, that she thought she was going to another house. She had been at a house in Carrubber's close before; but she found it shut;—and, at present, I see nothing to induce me to believe, that there was any thing like concussion. The inquiry as to concussion is very material. There might have been circumstances (considering her situation as a natural child) which might have called imperiously for her going before a clergyman. It is said, that because Miss Robertson has sworn, that she did not speak when before the clergyman, that consent has not been proved. I do not go into this. I have been at many marriages, and I never yet, upon these occasions, heard the lady speak. Delicacy sometimes prevents this; and a bow or nod of assent is generally all that takes place. But there is great room for taking a personal exception against the pursuer in this case: he visited the parties after the marriage with Mr Jolly, and addressed the woman as Mrs Jolly. This point should be more fully argued. If obliged to give a decision at present, I would be disposed to do so on this last ground; for I hold that the status of the children must be attended to. I think that the circumstance of there being no

children of the first marriage, makes some difference on the legal argument. June 20. 1828.

Lord President.—This is a most distressing case. I shudder at the consequences of touching what may be considered a solemn marriage. The fashion is to have as little ceremony as possible at marriages. It is not now as it was in the days of Sir Charles Grandison, when coaches and six, &c. Regular celebration is a matter of order, which, by removing doubts, gives certainty to consent. No woman of twenty-six years of age can doubt the purpose for which she goes before a minister, if she is not an idiot; and idiots are not capable of consent. I have great delicacy in touching a marriage so celebrated. It is said here, that the pursuer wishes the marriage declared, for the purpose of bringing a divorce; but if M'Gregor makes her his wife, he can never get a divorce—he can on no account get quit of her, if he does so. Instantaneous repentance, after deliberate consent, will not dissolve a marriage. If such was the case, there would have been many instances in point. Look at the case of M'Adam. He was married at breakfast time. In the afternoon he blew out his brains. Here it was wished to dissolve the marriage; but the House of Lords would not hear of it. This might have been a rash marriage; but it was a regular one. The story of the defender saying, 'What signifies a few words before a priest?' puts me in mind of the story of a Scotchman, who was examined at Carlisle in 1747. He swore through thick and thin; and when asked by his companions why he had perjured himself, he replied, 'Po! po! Do you think me such 'a fool as to swear away my soul by blowing on a book?' This was precisely the after-thought of the woman here, who thought there was no harm in saying a few words before a priest. I cannot believe that there was concussion. If such existed, she would have shewn it. M'Naughton's evidence does not prove it. But, from circumstances posterior to the marriage, M'Gregor does not seem to believe he was married. It is a new case, and should be farther investigated, particularly as to Dr M'Neill's presence at Mr Jolly's marriage. It is said, that the Doctor not only consented to M'Gregor's marriage, but that he knew it had taken place. If so, he was the most criminal of all, to connive at Mr Jolly's marriage. I should wish to be of the opinion of Lords Hermand and Balgray, for the sake of the children; but, even if the first marriage should be adopted, the bona fides of Mr Jolly, in contracting the second, would perhaps protect them, although it would not do so on the other side of the water. I

June 20. 1828. recollect something similar happened in Mr Riddell's case,* but the child died before a decision. I had, however, then spoken to the late Lord Meadowbank on the subject, who concurred with me in thinking that the child must be held to be legitimate. I am for remitting to the Commissaries to take further proof upon every circumstance which can bear upon the case.

A remit was accordingly made to the Commissaries, with instructions to allow a proof of facts and circumstances of the facts alleged, which was done, and evidence adduced as to the facts which occurred at the marriage of Jolly before the Rev. Dr James Robertson, of the conduct of Dr M'Neill on that occasion, and of that of M'Gregor subsequent thereto, and his possession of the title-deeds.

Witnesses were likewise examined as to the regularity or irregularity of both the marriages of M'Gregor and of Jolly. It appeared from the proof, that the custom of the session-clerk of Edinburgh was, on a party's (generally the bridegroom) applying for a certificate of proclamation of banns, to enter in the day-book an attestation of giving out certificate of proclamation of banns. Thus, (as in M'Gregor's case),—'Edinburgh, 22d May '1816.—Malcolm M'Gregor, printer, Old Church parish, and 'Mary M'Neill, St Cuthbert's parish, daughter of Dr James 'M'Neill, Edinburgh; that the parties are free, unmarried, of 'legal age, and not within the forbidden degrees; and he has 'resided within six weeks in Edinburgh, is certified by James 'M'Donald, running stationer, Edinburgh, Patrick Neill, print-'er, Edinburgh. (Signed) MALCOLM M'GREGOR, JAMES MAC-'DONALD.' Thereon a certificate of proclamation having actually taken place, was delivered to the party, and the above attestation posted shortly into a book called Register of Marriages, thus:—'Malcolm M'Gregor, printer, Old C. P., and 'Mary M'Neill, St Cuthbert's P., d. of Dr James M'Neill, 'Edinburgh.' (In the present instance, it had through inaccuracy been posted as of the 21st instead of 22d April). These lines of proclamation M'Gregor did not produce, alleging he had given them to Jolly, who destroyed them; but the session-clerk deponed, that a certificate of proclamation must have been given, although de facto no proclamation had been made at that time, it not being once in fifty times the custom to proclaim. On the other hand, neither was Jolly proclaimed, although he

* See Bell's Report of the proceedings in this case.

also had obtained from the South-Leith session-clerk a certificate of proclamation, according to the form adopted in the parish. On the above attestation being shewn to the Rev. Sir Henry Moncreiff of St Cuthberts, and the Rev. Dr David Ritchie, one of the ministers of Edinburgh, they deponed, that they would not have felt themselves warranted, on no better document being produced, to have married the parties;—two certificates of proclamation of banns would have been necessary, as the parties lived in different parishes: whilst the Rev. Dr M'Knight, one of the ministers of Edinburgh, deponed, that the practice was so common to do so, that he had celebrated marriages on a certificate of proclamation produced by one of the parties only; but that, disapproving of the practice, he had been instrumentary in bringing the matter before the Presbytery to have new regulations framed on the point. It appeared also to have been optional in the clergymen to keep or not to keep a record of the marriages they celebrated; and that their usual practice was to indorse on the certificate of proclamation a certificate of the marriage; and that previous to the year 1821, much irregularity prevailed, both as to double lines of proclamation, and making actual proclamation. An objection also lay to Jolly's certificate of proclamation, seeing he obtained it from the South-Leith session-clerk, while he (Jolly) lived in Edinburgh, and Mary Black M'Neill (as was alleged) lived in St Cuthbert's parish, although close on South-Leith parish, the limits of which do not seem at that time to have been very accurately defined. June 20. 1828.

On advising this additional proof the Commissaries were equally divided; but by a rule of that Court under such circumstances, they adhered to the former judgment, finding the marriage established, and decerning in terms of the libel.*

Mary M'Neill having then brought the case again under the review of the Court of Session,—

† *Lord Hermand* said,—This is a very difficult and important case. It is entirely made up of circumstances. As to these circumstances, so far as I can discover, every one is in favour of the defender, while there is not the shadow of a circumstance in favour of the other side, except the mere matter before Joseph Robertson. That is the only circumstance which the pursuer has brought forward in his support. As to the

* Commissaries Fergusson and Gordon delivered their opinions at great length, the former for, the latter against, the judgment.

† These are the opinions laid before the House of Lords.

June 20. 1828. ridiculous story of what passed at Holytown, that is all against the pursuer. Every body knows what kind of place Holytown is. There was no possibility of sleeping in separate rooms. The pursuer slept in the same room with Mrs Jolly, but in a separate bed: And what passed there? Why, she was in the arms of her husband. As to the attempt at a marriage at the Black Bull, that was a mere scheme. Then, there is the public marriage before a respectable clergyman, Dr James Robertson, one of the ministers of Leith, which took place in the presence of Dr M'Neill himself. Then, there is the after-consummation in the father's house, which took place with the knowledge of the pursuer himself. Then, at the distance of eighteen months, he brings this action. The pursuer says, the marriage before Joseph Robertson was merely a confirmation of the former private marriage at Holytown. Can any thing be more scandalous than this, or more clandestine? There is not even evidence of this celebration at Joseph Robertson's, except the acknowledgment of the lady herself. But I must take this acknowledgment in connexion with the fact, and must take the whole of her acknowledgment together. You will recollect she was a natural child; and, of course, independent of settlements, she had no right to succeed to her father. She says she was induced to attend at that time; as this person (the pursuer) declared, that, if she did not, he would destroy her father's settlements. It is quite true, that a legal marriage cannot be retracted. Most certainly it cannot. The defender does not say it can. But was this a legal marriage? Was there a full, a free, and a deliberate consent? The circumstances which I have stated appear so strong to my mind, as completely to satisfy me, that they would be sufficient to set aside much stronger evidence of consent than the pursuer has been able to bring forward. Indeed, I think the pursuer knew that there was no actual consensual celebration of marriage. I don't go the length of saying, that proclamation of banns is actually necessary to make a marriage. But if there was no proclamation, then it was a marriage of mere acknowledgment. In a marriage of that kind, it is settled by all our authorities, that circumstances must be looked to, which is all I contend for in this case. In the case of M'Innes, there was an express acknowledgment; and the House of Lords found, that the two letters mutually exchanged, were not intended or understood as a final agreement, or that the parties had thereby contracted the state of matrimony. I don't desire to go farther than the House of Lords did in that case; for I cannot discover that it was seriously intended, by the

parties in this case, to conclude a marriage. There is another case, the case of M'Gregor v. Campbell, where the marriage was celebrated in presence of a clergyman. I can conceive that we can go this length, that the pursuer knew there was in fact no marriage. This has been found even when there was a celebration, as was the case in that of Cameron v. Malcolm, and Allan v. Young. I look to what I call the real merits of the present case,—the marriage with Mr Jolly. It is attended and followed out by every circumstance which indicates a clear, serious, and solemn consent. See the evidence of the clergyman, Dr Robertson of Leith, by whom the ceremony was performed, and of Mrs Robertson.—(Here his Lordship read Dr Robertson's evidence.) I must also trouble your Lordships with one other evidence, for it almost satisfies me of the presence of the pursuer at this second marriage, which was carried on in the most solemn manner. (See Mrs Robertson's evidence.) I think it likely, on this occasion, that the pursuer was the bridegroom's man.* Here was a public solemn marriage, and if I am right that this bridegroom's man was the pursuer, I think it puts an end to the case. So that the evidence in favour of Mrs Jolly is superabundant. On the other hand, there is no legal evidence of the celebration at all at Joseph Robertson's. There was just the wife and daughter of Joseph Robertson,—and then you have only the defender's own acknowledgment. But I will do in this as I do in every other case, whether in the Court of Justiciary, or here. I will not cripple a declaration. I must take it out and out. I will take it as it is; and when she says she did go to Robertson's, she adds, that she did so under a threat, that he would destroy her father's settlements. In short, from the whole circumstances of the case, I don't see how the pursuer can succeed.

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Lord President.—I wish very much I could have taken the same view as my brother, considering that there are children of this marriage; and considering also, that Mr Jolly seems to be the only person against whom there can be no reproach. As to both of the other parties, their conduct is shameful. There is no objection to Mr Jolly's marriage. Every thing was regularly and solemnly conducted; and there can be no doubt it would be a good marriage, if it had not been vitiated by a former marriage. But that is the question;—and, therefore, what does the pursuer say as to Mr Jolly's marriage, which did not take place till the 14th June?—that, on the 23d of May preceding, he was

* This was a mistake, and was admitted to be so by the defenders.

June 20. 1828. married by the Reverend Joseph Robertson. Mr Robertson was, at that time, an ordained minister of the Gospel, and was entitled, by the law of the Church and State, to marry. The pursuer produced marriage-lines from the session-clerk of Edinburgh; and the witnesses to the marriage were, Mrs Robertson and her daughter. No doubt, there might have been a deficiency in the evidence; for although both the wife and daughter recollect a marriage, they might have been mistaken about the lady; but, unfortunately, that is supplied by the lady herself, for the defender acknowledges it. It is true, Mr Joseph Robertson may have turned out not so respectable a character; but as to his capability of celebrating a marriage, he was just as fit as the other. The parties were thus married in facie ecclesiæ in both the marriages, but in both of them without actual proclamation of banns: neither of them were regular; the one was just as irregular as the other. But the defender says she was forced into the first marriage; that no consent was given by her; that no consummation followed; and that the pursuer knew she was engaged to Mr Jolly. All this may be true; but has she proved either deceit, threats, or force? Is there the slightest evidence of it? She says the pursuer asked her, in the evening, to go to Mr Bridges, and that he led her to Mr Robertson's; and, under threats of burning the settlements, and murdering Mr Jolly, he frightened her to go in. There is no evidence of all this. Where did it happen? Was it on the heights of Lammermuir, where she could get no assistance? No;—this took place in a summer evening in the end of the month of May, when there was good daylight. She is led through the streets of Edinburgh, under threats of burning her father's deeds, and murdering her sweetheart. Was there no person near to protect her, and take her part? Surely, when she got into Mr Robertson's house, she was under protection: She could, at least, have told him of the threats that had been used against her, and desire him to send for a constable; but she says nothing. She does not even object to the ceremony. She is no child at the time;—she was twenty-six years of age. There is no evidence of all this alleged force and threats; and, to me, it is quite incredible, that all this could have taken place in day-light, in a summer evening, and in the streets of Edinburgh. Then, what happens afterwards? They walked home together;—they sleep, at least, in the same house together. It is true, there is no evidence of consummation; but is it not the presumption, that consummation did take place? And you will presume it the more, that this lady slept in the same room with him only

a few days before. It would have been more suitable, if, on that occasion, she had slept in the same room with her father. There might have been some indelicacy in this; but, at least, there would have been no impropriety; and where there was such a scarcity of rooms, it would have been more proper that she had slept in the room with her father, instead of that of a stranger. Therefore, I cannot take it off her hands, that there was no consummation; but, at all events, they walked home together, arm in arm. No doubt it is true, that both parties seem afterwards to have repented of the marriage; but repentance, however soon it follows consent, will not do. In one case, there was the most tremendous symptoms of repentance,—in the case of M'Adam. In that case, there was only an acknowledgment before servants, much less solemn than in the presence of a clergyman, as to which no person in their senses could doubt of the object in view—no mortal can be mistaken; but in that case it was found, both in this Court and the House of Lords, that the most instantaneous repentance could not undo the marriage. Therefore, the repentance of the first marriage, and the consent to the second, will not do. I won't say, and I have no occasion to say, that the consent before a clergyman is to be held as probatio probata. But this I will say, that there is no case, where the consent before a clergyman was found not to constitute a marriage, except these two cases of the children, where they did not come before the clergyman for the purpose of being married, but where, when the mother was out of the room, the marriage was performed, and the girl was taken away by the mother before it was published; so that there was no consummation. The only thing at all corroborative of the defender's story, is the fact that he was possessed of Dr M'Neill's settlements. But then, his answer is just as good,—that it was just in consequence of the marriage that the Doctor gave him possession of those. And then there is another incomprehensible part of the story,—that is, what took place at White's, the lapidary. Dr M'Neill was present on that occasion, and Mr White drank to his daughter's health, as Mrs M'Gregor; and no objections are stated. Then something took place about presents; upon which the Doctor said to Mr M'Gregor, 'It will all be yours;' which corroborates the story, not only of their being married, but of his knowing of, and being intrusted with, the settlements. The only thing that would have weighed, and weighed strongly, in my mind, if this first marriage had been constituted in any other way than in facie ecclesiæ; for you will observe, that all the clergymen say

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June 20. 1828. that they never saw a case where the marriage-lines were not delivered to the lady; but Joseph Robertson gave the lines, on this occasion, to M'Gregor himself. The object of giving the lines to the lady is, that she may have the proof of the marriage in her own possession; and, in that case, there can be no want of evidence of consent. But, in this case, it was of less consequence; because the lady could have recourse to the evidence of Mr and Mrs Robertson, and their daughter. In this case, the evidence is completely supplied. There can be no doubt, that the pursuer's conduct is most extraordinary, and most unjustifiable. He saw what was going on with Mr Jolly; he delivered up the title-deeds to him; he allowed Mr Jolly to act chief mourner at Dr M'Neill's funeral; he went to church with Mr and Mrs Jolly; he sat in the same pew with them. In short, he has been guilty of the most gross lenocinium that can well be imagined; and sure am I, that under such circumstances he will never be able to get a divorce. I wish I could separate this second marriage, which was every way regularly conducted, so as to give effect to it. But this I cannot do; and, considering all the circumstances, I regret I cannot do it. But the first marriage being constituted by what appears to me to be legal consent, nothing on earth can dissolve it, except a divorce, which this man, I think, will never be able to obtain.

Lord Balgray.—I am precisely of the same opinion. I confess, when the case was last before us, I was of the same opinion as has been expressed by Lord Hermand. From the circumstances which were carried on for a course of time,—Mr Jolly's marriage in June, Mr M'Gregor's knowledge of all that was going on, his conduct to the parties after that, and so forth,—I thought it was impossible that any marriage could have taken place with this pursuer on 23d May preceding. For I could not figure it in my imagination, that any human being, possessed of the slightest principles of honour, could ever let all these take place, if he had been married before to that lady. I confess, I was carried away with these considerations; but, on more cool reflection, and on a reconsideration of all the circumstances of the case, particularly with the additional proof, I perfectly concur with the opinion delivered by your Lordship.

Lord Craigie.—I was not here when the case was last before your Lordships; but I confess, I cannot find the slightest ground of difficulty in this case. The question is, whether there is evidence of these two parties having declared themselves married? This is a matter of fact; and I confess nothing can be more clear

to my mind. Independent altogether of the evidence of celebration, there is evidence as clear as sunshine, that these parties did meet, and virtually declare themselves married persons. There is no evidence of the woman's having been concussed. Indeed, several of the witnesses say, that she acknowledged the marriage which had taken place; but she added, it was nothing but words, and what signify a few words? With regard to the subsequent proceeding, that can have no effect on my mind. A marriage having been concluded thus, this comes to be a mere question of status; but when an engagement of this kind is once formed, it cannot be dissolved. Therefore, on the whole, although I certainly regret it, yet I think we would be undoing the law of Scotland, if we were to allow two individuals, after such a celebration, to get quit of their engagement, merely by their declaring that the marriage was at an end. June 20. 1828.

Lord Gillies.—I am sorry to say I am of the same opinion. From every feeling of humanity, I was inclined to have gone along with Lord Hermand. But I cannot do so. Formerly I felt very strongly what was expressed by Lord Balgray. I could not bring my mind to believe that a marriage had taken place in the face of circumstances which followed it. But, on closely going over this case, I think it is impossible to get the better of a marriage celebrated, as this was, in facie ecclesiæ. At the same time, the pursuer's conduct is, in every respect, most corrupt, and the conduct of the woman is highly criminal. The only innocent person, as your Lordship noticed, is Mr Jolly; and what is still worse is his children,—by making him the father of a family, which family is thus reduced to beggary. Whether there is any remedy for this, I do not know. They have been brought into this situation by the criminal conduct of the pursuer and his lady. To what extent the pursuer may be responsible, I cannot say. I pretend to give no opinion on this subject, and to give no advice. I merely throw it out as a matter of doubt, which arises from the peculiar circumstances of this case.

Lord President.—There was a case * somewhat similar to this in the Second Division, where we had a good deal of conversation, whether we could not enforce the old doctrine of the Roman law. However, that point is not before us: All we can decide upon just now, is the question of status.

The Court accordingly, on the 23d December 1825, adhered.

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* See previous Note, p. 109.

June 20. 1828. In the course of the discussion, M'Gregor presented a petition to the Court, praying for sequestration of the heritable and moveable estate belonging to Mary Black M'Neill, which had been taken possession of by her and Mr Jolly, and to serve the petition upon them. Mr Jolly made appearance at the Bar, by her Counsel, and answers were lodged in the name of 'Mrs Mary Black 'M'Neill, spouse of Robert Jolly, surgeon, Leith-Walk, and the 'said Robert Jolly for his interest.' The petition was refused. Afterwards this application was repeated: appearance was again made for Mr Jolly, and the Court sequestrated the heritable and moveable estate and effects of 'Mrs Mary Black M'Neill,' and appointed a judicial factor, with instructions to pay her, in name of aliment, half of the free annual rent; and out of the remaining moiety, the expenses of the litigations she was engaged in. No application had been made in the principal action to have Mr Jolly or the children heard for their interests; nor had they in that action been sisted as parties.

Mary Black M'Neill appealed.†

On the case for the appellant being opened by Dr Jenner, afterwards the King's advocate,—

The Lord Chancellor stated,—Considering the situation of Mr Jolly and his children, in relation to this cause, their Lordships wish to be informed whether you can cite any case in the Courts of Scotland, for the purpose of establishing the proposition, that Mr Jolly and the children are not entitled to be summoned in proceedings of this description.

Keay. My Lords, I can state upon the authority of one of the Judges of the Consistorial Court in Scotland, that there is no instance of a declarator of marriage, in which it was thought necessary to cite any other than the principal defendant.

Lord Chancellor. Is that opinion, to which you refer, to be found in the printed case?

Keay. No, my Lord, I speak of the opinion of a gentleman now below the Bar.

Lord Chancellor. Is that gentleman aware of any decision going the length, that a party standing in this situation need not be summoned?

Keay. He knows of no instance of parties, so situate, being summoned.

Earl of Lauderdale. The speeches of the Judges in the Con-

† Lords Chancellor Lyndhurst, Eldon, Lauderdale, Stowell, and Rosslyn, attended the discussion of this appeal.

sistorial Court are given in these printed cases; do you allude to any passages in them as justifying that which you have stated? June 20. 1828.

Keay. No, my Lord.

Lord Chancellor. No such point was decided in the progress of the cause.

Keay. This objection was not taken, either in the Consistorial Court or the Court of Session; but it appears that on different occasions on which the evidence was taken, Mr Jolly attended personally.

Lord Chancellor. Yes, but that is avoiding the question. What does Mr Miller say upon the subject?

Miller. My Lords, The rule which Mr Keay has just stated to your Lordships is the general rule, on the supposition that, in a declarator of marriage, it is to be held prima facie that there is only one marriage; that it is in order to compel the party against whom the declarator is sought, to adhere to him or her, and to sustain the relation of husband and wife; but in any case in which the pursuer of such an action is cognizant of a second marriage, (as appears distinctly in the evidence of this case), I believe it will be impossible for my learned friends, or for the Judge of the Consistorial Court to whom he has now appealed, to refer to any case in the law of Scotland, where the party having that interest has not always been cited; and there are a number of cases, several of which would have been brought under your Lordships' notice had this argument proceeded, the very title of which brings this point under consideration, shewing that where more than one is interested, it is necessary that the declarator should embrace the case of both. I would refer to the case of Pennycook *v.* Grinton. In that case there were two marriages, and in each the pursuer concluded, not against one individual, but against both. I am not aware of any instance in which, where the pursuer was aware of a second marriage, he did not conclude against the husband and children of that marriage.

Dr Lushington. I would ask the learned gentleman on the other side to state this,—Does he ever remember an instance of a declarator of marriage, in which the party had cited any person except the individual who was alleged to be the wife or the husband? and if the practice has uniformly been one way, the onus of shewing it ought to be otherwise, must necessarily lie on those who are contending for an alteration of the practice.

Miller. My Lords, I think I can answer the question which has been put, so far as the citing the two parties goes. I do not recollect any instance where, the second husband or the second

June 20. 1828. wife being alive, the husband or wife of the first marriage brought the declarator; but there are cases unquestionably, where, after the death of the second husband or wife, the husband or wife of the first marriage has brought a declarator, concluding, against the children of the second marriage, to have it found, that the pursuer of that declarator was entitled to all the rights and benefits arising from the status of the lawful wife as against the children of the person deceased, whose representatives they called into the field as the issue of the second marriage.

Earl of Eldon. My Lords, it is impossible for me to think that this is not a most important case in many respects. In the first place, one feels a great deal of pain that such a case should be decided between two individuals, and with an attention merely to their interests, where there are other persons most deeply interested in the decision who have no opportunity of being heard. In another point of view, it is extremely important to consider whether this principle should be acted upon. If it has been the constant course of the Consistorial Court in Scotland to proceed without attention to the interests of those other persons, your Lordships will feel a great deal of hesitation before you will introduce a new practice, that will go the length of destroying all which has been done in judgments in former cases in those Courts. There is a difficulty, therefore, in considering this case on both sides of it; and under that impression I do confess it appears to me, that it would be extremely advisable that the Counsel should first be heard upon this point, as to the practice in the Consistorial Court in Scotland, and I can see no objection to the cause standing over for a few days, with a view to their laying Cases on the table on that point; first, For the purpose of preventing our interfering with the interests of persons who are not before us, but who may have very deep interests; and, secondly, For the purpose of guarding us against the mischief we may do by destroying the effect of what has been done in other cases, in which this intervention has not been called for, but where the interests of others have been affected. Under these circumstances we ought not to interfere with the principle of former decisions, unless we are quite sure we are not doing mischief by so doing. It strikes me that it is very material the parties should be heard upon this point, before they go into the merits of the case.

Lord Chancellor. Within what time do the Counsel think they can be prepared to lay Cases as to this point on the table of

the House, and to argue the point? It is desirable it should be done as expeditiously as possible. June 20, 1828.

Dr Lushington. My Lords, we should be under the necessity, in relation to a question of this importance, of sending to Edinburgh for the purpose of having search made there, where, in all probability, there will be access to former cases much more than can possibly be obtained in London; but we would be ready to do it in any period which your Lordships may think reasonable.

Dr Jenner. In a question of this importance, as my learned friend has stated it to be, we feel the same necessity for a reference to Edinburgh. But there is one mode in which the necessity of this could be obviated, which is by giving Mr Jolly leave to present a petition to intervene in the present course of proceedings, which was done in the case of Dalrymple. There the second wife was not a party to the proceeding in the Consistorial Court of London; but she did intervene in the Court of Arches, and took the case by appeal to the High Court of Delegates, to prevent the effect of her rights being affected by the sentence; so that the case would be analogous. A petition might be presented by Mr Jolly, for leave to intervene for his interests in the present course of proceeding.

Earl of Eldon. Could that lady have been allowed to be heard before the Delegates if she had not intervened in an earlier stage of the cause?

Dr Jenner. Yes, my Lords, she might have intervened in the Court of Delegates.

Dr Lushington. She might have intervened at any period. I have not the slightest objection to the intervention of Mr Jolly and the children, and their arguing the case, if they think fit.

Earl of Eldon. They could not be ready this Session.

Lord Chancellor. There are objections to that course of proceeding, and the House are of opinion it is probable no time would be saved by such a course. Their Lordships are of opinion, that the Counsel may most probably be prepared by Monday week, and that Cases should in the mean time be laid on the table with respect to this point. It is a point of great importance, as far as relates to this cause, and of great importance as a general question. The Counsel will understand that this cause stands over till the Cases are laid before the House. It will be convenient we should have the cases on the table of the House as early as possible.

Cases having been accordingly given in,—

The King's Advocate, (Dr Jenner), for the appellant, main-

June 20. 1828. tained,—The second husband and children ought to have been called. No doubt it may very often happen, that, in cases of the present nature, the pursuer may not be precisely aware of the existence of the second marriage, and consequently will be silent as to it in his summons of declarator; but here M'Gregor was connusant of the second marriage, and had dealt with the parties as man and wife. Even, therefore, in the numerous cases quoted, if no notice is taken of any other party than the husband or wife defendant, that would afford no precedent against us.

Earl of Eldon. There is one point, Dr Jenner, to which I wish to call your attention, and that is, whether the cases to which you are alluding, are cases where the circumstance occurs that occurs in the present case, that neither in the summons of Mr M'Gregor, nor in his condescendence, does he take notice at all of any subsequent marriage?

King's Advocate. The cases are various. In some only the husband or wife is cited; but where there has been notoriously a second marriage, that, at all events, enters the detail of the narrative. All parties having interest must be called to the suit,—"Res inter alios," &c. But neither Mr Jolly nor the children have been made parties to the present action; not a word is said of them in the summons, although they are as directly interested as if the action had been against them. Mr Jolly enjoys at this moment the status of husband, and the children the status of lawful children; and are they to be deprived of these valuable rights by the suit against the appellant, to which they were not made parties?

Earl of Eldon. The papers before us say, supposing there were originally a necessity for bringing all parties before the Court, as the husband knew this suit was going on, he is bound by his silence if there is a judgment given in favour of M'Gregor; but I want to know how that argument is to be applied against the children.

Dr Lushington. There might be very great difficulty in applying it, if your Lordship's first position were correct, that it is necessary to cite all the parties in a matrimonial suit; but at the time the suit commenced, there were no issue born.

Earl of Eldon. There may have been an infant ventre sa mère.

Brougham. That makes the case stronger for the appellant; for if a born infant is not to be bound, how can a child unborn?

King's Advocate. There was a vested interest, and a possible interest, both of which must be protected. It is not a rule, that it is not necessary, in matrimonial suits, to call all parties interested; especially if a party comes forward with undisguised mala fides.

After having concealed his pretended status, and acquiesced in the rights of another, he could not take the advantage of the rule even if it existed. The effect of the judgment of the Court of Session is to make the second marriage void, while the parties most deeply interested in this finding have had no opportunity of contesting the sentence. The parties would not have been so concluded in questions involving mere pecuniary rights; and there is every reason of expediency and justice why they should not, in questions involving the status of marriage, where not only patrimonial interests are at stake, but the most valuable of all rights, viz. the subsistence of a relation in which the whole happiness of the parties may depend. This would hold true, where there was a mere pretension to the character of husband, on the ground of a second marriage; much more where the second husband holds, and has held, possession of that acknowledged status, and where the first husband has recognized that status. That distinction discloses a manifest error in the summons, which is here confined to the first marriage; but where once the second marriage is a matter of notoriety, then the summons, in conformity to received practice, ought to be full and circumstantial, and contain a narrative of the whole facts. But it is said, that although these parties were not called, they might have intervened, and they were, in fact, connusant of the proceedings. The very power, however, to intervene, proves the rule, that every person having interest ought to be made a party; for the reason why a party may intervene, is because he ought to have, but has not, been called a party. Besides, it might be most dangerous to intervene after the suit has advanced. The whole evil (as took place in the present instance in the appellant's rash and unskilful admission of the res gestæ at Joseph Robertson's house) might have been done; and to intervene then, would have been to have taken the case as it stood, according to the respondent's view of intervening. But a party ought not to be deprived of the advantage he might have enjoyed in the preparation and management of the suit: it was the pursuer's business to bring the proper parties into the field, and not having done so, he has himself to blame. To this it is no answer to say, that Mr Jolly knew of the proceedings, or could have sisted himself. The law has pointed out the means of calling the necessary parties, and such an equivalent, as a vague allegation of private knowledge, cannot be listened to. If the parties intervene now, matters must be begun ab initio; that is the only cure to the evil. Mr Jolly's defence might have been, and indeed was, in very important respects, different

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June 20. 1828. from what has been stated for the appellant. The interests of man and wife, when a first husband comes forward, are not identical. Neither can the wife admit away the status of her husband; nor the parents, the status of their children; and yet according to the respondent's doctrine, both are here admitted away. It is said, that Mr Jolly is entitled to no favour: But what favour does Mr M'Gregor deserve; he who sees his wife cohabit with another man, and lies bye from mercenary motives? This is a case sui generis; and if so, the general rule, whatever it be, must give way. Mr Jolly and the children are the partes principales. What consortium vitæ has the respondent lost? But, at all events, whatever may be said as to Mr Jolly's privilege, the children may be intervened, and insist on matters being restored ab initio. They, in the eye of law, had neither mind nor discretion. Nay, there is this singularity in the present case, that the suit implies that the children are bastardized. If so, how can they have tutors? This House, however, can call them, or tutors ad litem can be appointed. The respondent contends, that the judgment is universally binding and conclusive. That makes it more necessary to call the children, and that the House should act in this matter as their guardian.

Earl of Eldon. I have just now looked into the petition for sequestration. I see that there the parties enter into the merits of the case, and Mr Jolly's pecuniary interests are allowed to be affected; the management and enjoyment of his wife's property being taken out of his hands, on a proof to which he had been no party. This may be agreeable to the law of Scotland, but certainly the like proceeding I never heard of before.

King's Advocate. The proceedings have been most extraordinary from the very commencement; and we submit that your Lordships have but one course to pursue,—to reverse these judgments, and leave to the party, if he chuses, to reinstitute his suit in legal and proper form.

Dr Lushington (for the Respondent). It is contended by the appellant, that all the proceedings hitherto taken are null and void, by reason of the want of certain parties, said to be necessary, viz. the parties who contracted the second marriage, and the children born after taking out the summons. But is it maintained that all persons interested have necessarily a right to be made a party? or is the rule confined to narrower limits,—that only the husband and children must be called? or is this case, on account of its peculiar circumstances, to be allowed to be an exception to the rule? We are, however, prepared to

take it in any way. The doctrine, that all persons interested in a suit must be made parties to it, does not apply to a declarator of marriage. There is no necessity for citing the husband and children; nor is there any thing peculiar in the case to call for a different practice. An action of the present nature does not admit of the citation of any other person than the defender sought to be declared the husband and wife. This is the practice of all Courts exercising jurisdiction in marriage cases. It is borrowed from the civil law; and the principle is, that it is only the party principally interested who need be called. The only exception lies in the case of collusion. If that does not taint the proceeding, all parties interested in the second marriage, though not called, are bound by the result of the declarator. The brocard, 'Res inter alios,' &c. applies to mere pecuniary suits, but not to matrimonial cases. In these it is sufficient if the legitimus contradictor is a party; all who claim through him are bound by the sentence in the cause. I say bound by that sentence; but I need not go that length. It is enough to say, it is not necessary to call any other person. The effect afterwards is not before us. Accordingly this you find, (for the Scotch law is founded on the civil law), from the cases cited, to be the practice of the Scotch Courts. The appellant has endeavoured to prove the reverse, but has totally failed. But by what better test can a doctrine be tried than that of practice? In no instance, where there was a second husband and children, have the Court compelled their presence; and never have proceedings been held to be void because no citation had been given them. Why the rule and practice has been so, I cannot be asked. It is the custom; and custom makes the law. If you violate that practice, you assume the functions of the whole Legislature. Nor could the practice be violated without violating the principle on which it rests. This rule is founded on the soundest of all principles—on the necessity of the case with respect to marriage suits. Nothing would be productive of more danger than to entertain the idea that other parties than the partes principales must be called before judgment could be pronounced. Marriage does not admit of fluctuation or change; and yet what would be the consequence if other parties were not concluded? Suppose there is a declarator of marriage raised, the conclusion of which is, that the wife is bound to return and cohabit with the pursuer: If the sentence is pronounced to that effect, what would you say to the intervention of the second husband, demanding her to return to him? It may be that the second husband has been

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June 20. 1823. ignorant of these proceedings; but could he dispute the sentence, and take his wife back, and bastardize the children which may have been born?

Earl of Eldon. What is the last stage in which a second husband can intervene?

Dr Lushington. Up to the last moment.

Earl of Eldon. Is it the fixed rule of your Court, contradistinguished from other Courts, that the Court itself will not call parties who may be interested in the result?

Dr Lushington. I apprehend that in matrimonial causes the Court would not.

Brougham. In the Dalrymple case no party represented Laura Manners in the Consistory Court, but before the case was finally decided she was made a party.

Earl of Eldon. In that case it was stated, that although Miss Manners was not a party to the suit, yet that she might, if she pleased, have intervened. She was in substance a party; for her marriage was pleaded and proved in the course of the suit; and was therefore as much under the eye and protection of the Court as if she had been formally a party to the question of validity of Miss Gordon's marriage; which in effect would decide upon the validity of her own. I understood that the Court thought that Miss Manners would take better care of her own interests than the Court would.

Dr Lushington. That is an apt example of what I have been stating. The suit for restitution of conjugal rights may be compared to a Scotch declarator of marriage. Yet did the Judge say, 'Stop, I will not proceed farther until I see Miss Manners come 'forward and protect her interests?' The Court ordained Dalrymple to take home Miss Gordon as his wife. Then there was an appeal, and Miss Manners did what she might have done at any time.

Lord Chancellor. In any stage, and in any Court of appeal?

Dr Lushington. The rule with us is, that a party having interest may appear when he chuses; but he must take the case as he finds it. Besides, if justice or expediency required a different rule, would it not have been adopted in the Dalrymple case—a case of such importance to Scotland and England? But the learned Judge knew, that to do so would have been to spread doubt and dismay among other litigants. Look a little farther. Suppose a husband prosecutes a declarator of marriage, he being ignorant of the second marriage; there are children of this second marriage; these children may be in a foreign country,

beyond the possibility of the means of citing them. What is to be done then? Is the status to remain in doubt? A status made ad consortium vitæ to be suspended ad infinitum? Who can tell at what time you can call all persons who have a real interest? Where are you to put the limits? The ground-work of all this is, that it is only the partes principales who are to be called; and this shews how Mr Jolly is bound. He claims by and through his marriage with her. Unless she was a party to the marriage with him, neither he nor his children could claim through her. But if she was legally married to him, she had the greatest interest in the world to prevent the declarator of marriage with M'Gregor. Nor is there any thing peculiar in the circumstances of the case that requires a different rule; any thing of that grave and important nature demanded by justice and equity, to refuse which would be a breach of both. June 20. 1828.

Earl of Eldon. Will Mr Keay inform us, Whether, according to the law of Scotland, the second husband could intervene while the suit was in hearing before the Court of Session?

Keay. I apprehend it would have been competent for him to have done so.

Earl of Eldon. If he could have sisted himself as a party in the Court of Session, are we not sitting here as the Court of Session? and, therefore, if he might have sisted himself in the Court of Session, he may, if he pleases, sist himself here. But if he intervenes, Dr Lushington will maintain, that Mr Jolly is bound by all that has been done,—by all the proofs which have been taken below. But then Mr Jolly must be heard on the point, whether he is so bound, before the House can give any judgment.

Dr Lushington. I could not object to that. I should only contend on obvious general principles, that you cannot permit a party to hang back till you come to the last stage of a cause, and then allow him to annul all that has been done before. It would be contrary to all the principles of justice, besides incurring the infinite danger which would arise from such a mode of procedure. It is impossible to deny that it was owing to Mr Jolly's own folly that he did not intervene. He attended the examination of the witnesses, and was a party to the sequestration; so he has no peculiar claim upon your Lordships' favour. The defence of 'all parties not called' is a dilatory defence, and if not offered in due time, is understood to be waived. But he lay bye for nine years, all that time fully aware of the progress of the law proceedings, and in substance, if not in form, the

June 20. 1828. dominus litis. Then as to the children: They, to be sure, cannot be held to have been aware of these proceedings; but still they are bound by the same rule as to the commencement of the suit. They could not have been made parties, for there were then none born. But if, according as they were born, it were necessary to cite them to save the proceedings from nullity, you never would get to an end; for when could you say there would be no more born? To listen to the appellant's doctrine would be to let in claims which have long since been understood to be concluded; to create confusion and dismay; to disturb a long established practice; and occasion consequences which my foresight and knowledge do not enable me to predict nor describe. Dr Jenner complained that the second marriage was not mentioned in the summons. We answer, that stating the second marriage is utterly superfluous; for by all laws of God and man, a valid marriage cannot be nullified but by a competent Court, where there is such, or by Parliament. Least of all is the pursuer the party who is to be expected to make that statement, for he avers his own marriage, and denies the pactum secundum. If it is ever done, that arises from the party's own choice, as being beneficial perhaps to his plea.

Earl of Eldon. I take it that M'Gregor means to say that these children are prima facie his.

King's Advocate. Yes, my Lord.

Earl of Eldon. But only prima facie. Now, with respect to them, suppose the House should think that the children ought to have an opportunity of intervening—there is a difficulty here that this House cannot appoint curators to appear for the children—and therefore it would be necessary to travel through the Court of Session again before the case could come here for decision; and I agree with Dr Lushington, that these suits ought not to be delayed.

King's Advocate. No doubt, my Lord, no farther than is absolutely necessary for the interests of justice.

Lord Chancellor. Is it meant to be admitted, that there might have been an intervention in the Court below on the part of the children?

Dr Lushington. I should say that that question is attended with a good deal of difficulty. In the present case I am inclined to think that the children could have been admitted; but their character would have been particular, for they assume legitimacy, and they claim to have a lawful father; but means might

have been found out to intervene them in the Court below in one shape or another. June 20. 1828.

Earl of Eldon. My Lords, I would humbly advise your Lordships to let this case stand over for a week for consideration. It is certainly an extremely important thing that this House should not disturb the usual course of practice in the Courts below. There ought to be very particular reasons and circumstances that should induce the House to do so; and I think that this is a case in which we ought to make a sort of covenant with ourselves, that the impression which the nature of the case must make upon every man's mind should not lead him too hastily to depart from these rules. Under these circumstances, it does appear to me to be a very salutary proceeding to take a little time to consider this case. To which I would add this, that, according to my notions of the practice of this House, it will be very difficult for this House to say that there shall be now these interventions on the part of the husband Jolly, and the children. Doubting whether the course of proceeding here would not be that which I should wish to avoid, if possible,—namely, to send the case back to the Court of Session with a direction to permit them to intervene,—I doubt whether we can originally do that; and I move, therefore, that this case should stand over until some day next week—to this day se'enight.

This was accordingly agreed to; and, when the case was next moved,

Earl of Eldon observed:—My Lords, When this cause was heard at your Lordships' Bar, in consequence of what passed in a previous Session of Parliament, your Lordships were pleased to direct that Counsel should be heard on the question, Whether the cause could be decided without bringing other parties before the House, who appeared to be interested in opposing the case of the pursuer in this action? I am extremely glad that your Lordships were pleased to permit this matter to stand over, with a view that the question, whether there were sufficient parties before the House, might be fully considered before you ventured to say that you would not hear the cause upon its merits: first, Because it is of very great consequence that the general doctrine, in cases of this sort, with respect to who should be parties to a suit, should not be disturbed by what is done in this House; in the next place, Because, if it was necessary that those persons who have been mentioned, viz. Jolly, one of the husbands, (if I may so describe him), and the children of Mrs Jolly, probably by that Mr Jolly, or who perhaps may have a claim now to say that

June 20. 1828. they are the children of M'Gregor, should be before the House as parties, it is important that they should be made parties to the suit, before you enter upon the question of the merits.

My Lords,—This is not a mere action of declarator, unless the prayer with which the summons concludes is the ordinary prayer in an action of declarator of marriage; and I mention that, because it does appear to me to be a matter of very great importance, that when the question is discussed upon its merits, some attention should be given to the prayer of this summons. It is not merely a prayer that it might be declared that Mary M'Neill, sometimes called Mary Black M'Neill, and Malcolm M'Gregor, are lawful married persons, husband and wife of each other; but it likewise prays, that the Court would decern and ordain the defender to adhere to, and cohabit with the pursuer, and treat and entertain him in all respects as her husband. And one question which may probably deserve consideration, (I speak this entirely without prejudice), is this, whether it is competent for a man, supposing him to have acted with respect to this second marriage in the manner in which the printed cases state M'Gregor to have acted, to come into Court, not merely for the purpose of having the marriage declared with respect to the civil consequences of the marriage, but to call upon that individual woman, with reference to whom he has so conducted himself, to return to him, and cohabit with him as man and wife?

What would be the case here if it were a suit for the restitution of conjugal rights, and the husband had so acted who instituted that suit, I do not pretend to say that I know; but it is a point I should wish to hear something of, at the Bar of this House, before I can bring my mind to say, that if the case is made out in point of fact, with respect to the conduct of this man, admitting that it were a suit for civil purposes, as for rents and profits and so on, that the suit might be entertained to the extent of having it determined judicially that he was the husband. I do entertain very considerable doubt indeed, whether a man who makes a present of his wife, in the manner in which this gentleman is stated to have made a present of her to Mr Jolly, has any right to come into any Court for the express purpose of calling her back again to cohabit with him, and to act towards him as a dutiful wife ought to act to an affectionate husband.

My Lords,—With respect to the question of parties, your Lordships heard from the Bar, and have heard it very properly as well as very learnedly stated, what is the general rule with

respect to making parties to such a suit as this. If you are disposed to say, that you do agree with the doctrine that the husband Jolly and the children should be made parties, I am sure that your Lordships will feel that it is not in your power originally to determine a point of that nature, but that it would be necessary to direct the cause to be remitted, in order that the question with respect to the rights of these parties might be fully considered, and properly adjudicated. June 20. 1828.

Now, on looking through the papers, I find that it is there insisted, and has in fact been pronounced by the Court below, that Jolly is not a necessary party. That might, perhaps, fall under your Lordships' consideration as a matter of appeal. With respect to the children, their right to intervene, or rather the necessity, I should say, of having them as parties before the House, does not appear to have been considered at all in the Court below; but that would not relieve you from the necessity of sending the cause back again, if a point on their behalf is to be made, with reference to the question, whether they should be made parties or not. And really there is a most curious circumstance in this case with regard to that point. For, whatever might be the case with respect to children in other circumstances, I apprehend that prima facie you have the right of those children now before the Court, because those children being prima facie the children of the husband of this person, and M'Gregor is the husband, they are prima facie his children; and until he is divested of the prima facie character of the father of those children, he would be in truth their tutor, or the person to take care of their interests; and a singular distribution of parties it would be, if he had that onus of that duty laid upon him under such circumstances, for no one could suppose for a moment that it would be honestly discharged.

But whatever is the general doctrine with respect either to the necessity of having the parties or the rights of persons to intervene, it has on the one hand been very properly admitted by the Counsel, that the general rule is, as Dr Lushington and another gentleman has remarked it to be, that it is not necessary to have any parties but the parties principally interested; and there are many considerations of policy with respect to marriage suits in particular, that may make it expedient not to depart from that rule. On the other hand, it can hardly be denied, that this rule is a rule familiar in many other cases besides matrimonial cases; and in a Court in which I long sat, we all know that a suit may go on against an infant tenant in tail, and if that infant tenant

June 20. 1828. in tail should happen to die, yet the proceedings had against him would be good against the remainder man when he came into existence, because he was the principal party interested when he was before the Court. It has not, on the other hand, been denied, that the husband may intervene if he pleases. It has not been denied, that in a special case the Court may call on the parties to bring before it other parties than those admitted to be interested in the suit; and if that doctrine is to be applied only to special cases, it is quite clear, that before we can say a word as to whether that applies to this case, we must be able, after hearing this case on its merits, to determine whether this is that special case in which we shall call for such an intervention as I have now alluded to.

My Lords,—Upon that ground, as well as upon the other grounds, it appears to me, that it may be extremely right to go on with hearing the case on its merits; for this appeal is brought before your Lordships under the sanction of very eminent Counsel, as an appeal fit for you to hear; and I am sure I may say, without offence to any body, that if the intent of desiring Counsel to sign appeals, and other proceedings in Courts of Justice, were fully attended to, I believe it would work as beneficial a change in the administration of the law as any whatever that can be mentioned. The suit being a proper suit to be heard upon appeal, it is quite clear that Mr M'Gregor, if your Lordships should happen to reverse the judgment, can have no reason to complain, if you reverse it on the merits. It is a case, therefore, in which, in one view, and supposing the cause to come to one end, you may decide this matter, which it is agreed on all hands at the Bar, ought to be decided without all the delay which must take place if you were to go through the operation of remitting it to the Court of Session, and then discuss in the shape of a future appeal from the Court of Session, which may not take place for some years, and the final decision of this case may not be obtained till a great lapse of time shall have taken place, and these parties be kept in the state of misery in which some of them must be at present.

My Lords,—There is another circumstance in this case, which strikes me is a very material one; and I take the liberty of mentioning it, that the Counsel may consider whether there is any thing in it, or rather, I should say, the papers before us, that may require much to be said upon it; and it is this:—I observe that in the Commissary Court it is found, that there are not proofs of circumstances sufficient to elide (I think that is the expression)

the intention of marriage. They apply that species of finding to a marriage which is said to be regular and in facie ecclesiæ. I observe, too, there are a great many cases cited on both sides, with a view to bringing under discussion the question, whether a marriage cannot be attacked upon the ground of want of consent, being made out by proof of force or fear. There is a great deal likewise to be found in the papers with reference to the question, whether evidence of circumstances may not be adduced to shew, that notwithstanding the marriage was regular in facie ecclesiæ, and though you cannot attack it on the general ground either of force or fear, (the point is a very singular one—is a very important one in its decision one way or the other), whether it is not consistent with the law of Scotland, that even where there is no force or fear, there may yet be circumstances which shall give the parties a right to deny the intention of being married persons, though they went through the ceremony regularly; and I mention this, because I do not see how this House can either affirm or disaffirm the judgment of the Court below, without taking notice of some parts of the contents of the interlocutors which have been pronounced bearing reference to that most important point. June 20. 1828.

Under these circumstances, therefore, my Lords, it does appear to me proper humbly to advise your Lordships to call upon the Counsel at the Bar, if they are now prepared so to do, to go through the case upon its merits, or, if they are not now prepared so to do, to mention some day on which it will be convenient for them to undertake to go through the merits; and I propose to your Lordships that that course should be adopted.

My Lords,—I would just mention, that this is not an action of declarator concluding for divorce; but it is an action of declarator by a person, stated to have conducted himself in the manner I mentioned, concluding for what we should call a restitution of conjugal rights; nor is it an action of declarator of any other species, where, upon the proof of the marriage, civil rights of property are to be enforced.

Lord Chancellor. It is very desirable that the cause should go on now if the Counsel are prepared. They were prepared to have argued the case last Session.

King's Advocate. My Lords,—In consequence of what has fallen from one of your Lordships this morning, it has become a case of very great importance, and calling for some consideration before we proceed to discuss the merits of the case. Quite a new view has been thrown upon the case by the observations of the noble Lord.

June 20. 1828. *Lord Chancellor.* Will the Counsel at the Bar name a day when they will be prepared?

King's Advocate. This day week, if convenient to your Lordships.

On the Merits.

Appellant. The marriage between Mr Jolly and Mary Black M'Neill is proved beyond doubt, not only to have taken place, but to have been celebrated with the entire consent and approbation of Dr M'Neill. It was as regular as Scotch practice required; for there is no particular form of celebrating marriages. This marriage was followed by open and avowed cohabitation as man and wife, and the birth of children. Bearing this in memory, look to the grounds of this action. The marriage at Holytown is not even attempted to be supported by evidence. The situation in life in which the appellant had been educated does not make the scene there remarkable, or afford any inference of consummation. What proof there is, goes to the reverse. If there had been a ceremony, some trace would have been preserved of it. Then comes the marriage at Joseph Robertson's; but here also the evidence fails. There is no proof of identity by the parties present. Robertson's certificate is utterly worthless as a matter of evidence; and if the respondent betakes himself to the appellant's admission, he must take it as she gives it, with all the qualification of deception, force, and fear, and the power which M'Gregor's having the title-deeds gave him over her. Besides, even if there were a shew of consent interposed, it was not a consent for the consortium vitæ, for a bona fide marriage; and, looking to the consequences of a real marriage, there was no consummation. If M'Gregor had, for the first time, slept at Dr M'Neill's on the night of this ceremony, there might have been some colour given to the respondent's plea; but he was a residenter there at the time. If he had slept with Mrs Jolly, the usual signs and tokens would have betrayed it. All along he had known that Jolly was paying his addresses to Mary Black M'Neill, and was the favoured suitor. Next he sees her living at bed and board, and tolerates this connexion, or rather expressly sanctions it, for a year and a half, and then for mercenary motives (which he admits) endeavours to oblige her to come to his embraces. We don't argue that the conduct of parties will set aside a marriage if legally and seriously solemnized, but we detail this conduct to shew that neither Mrs Jolly nor M'Gregor thought they were married,

which goes deeply into the point of consent, and casts the greatest doubt on the truth of the respondent's statements. Campbell v. Cochrane, when properly understood, supports this view. June 20. 1828.

Earl of Eldon. In that case, as reported in Morrison's Dictionary, it is stated that the judgment was reversed. I have endeavoured to find the case, in this House, upon the hearing, and why the judgment was reversed; but it is not to be found. Upon looking, however, into the Journals, it appears that the reversal was by consent.

Dr Lushington. Undoubtedly, my Lord, it was by consent; but it appears from the Dalrymple cause, that it was by consent after the respondent had been heard in support of the judgment.

Earl of Eldon. It was a suit between two ladies, after the death of the husband, contending for the character and status of widow, with respect to some pension that one or other would be entitled to, if one or the other was declared the widow. The one brought an action against the other to set aside the marriage; but both parties were brought by appeal before this House to contest that very point. It was a mere question as to the right of property.

Earl of Lauderdale. In whose opinion is that case mentioned?

King's Advocate. The case is referred to in all the depositions of the learned Advocates in the case of Dalrymple.

Earl of Eldon. Does it appear, from any account which you have, whether there were any other property, in respect of which the declarator of marriage was instituted, except the King's allowance to the officer's widow? because if there were no other property to be taken up by the widow, you can very easily account for the consent; for unless it was ascertained who was the widow, I apprehend neither of them would have got that allowance.

Lord Chancellor. We have found the printed cases in the second appeal. They are in the Library.*

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* Jean Campbell v. Magdalen Cochrane, 31st January 1753.—The following statement of the case alluded to is taken from the Records of the House of Lords. The decision of the Court of Session will be found reported under the title 'Personal Objection,' Campbell against Cochrane, 28th July 1747, Morr. 10,456. (which see). By that decision the Court remitted to the Commissaries, with instructions to find 'that 'Mrs Kennedy (Magdalen Cochrane) was barred personali exceptione from being 'admitted to prove that she was married to Campbell of Carrick, before he was 'married to Jean Campbell.' Mrs Kennedy appealed. The Records of the House

June 20. 1828. *Earl of Eldon.* According to these cases the judgment of the Commissaries is, that the alleged prior marriage was not proved, and they dismiss the pursuer's declarator.

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of Lords, (22. Geo. II. vol. xxvii. page 259.) bear a petition, by Mrs Kennedy, (17th January 1748), stating, 'that by order of this House, of 13th December last, 'the hearing of her appeal, to which Jean Campbell and others are respondents, was 'put off till to-morrow, and that the parties are under a compromise,' and praying to adjourn hearing; which hearing was adjourned accordingly. Thereafter (6th February 1748) appears this entry:—(P. 273). 'The appellant's Counsel were heard 'shortly to state the case, and prayed that the interlocutor of the Lords of Session, of 'the 28th July 1748, and the interlocutor of the Lord Ordinary in respect thereof, of 'the next day, and also the two interlocutors and sentences of the Commissaries in consequence thereof, of the 5th and 6th of August 1747, (carrying the judgment of the 'Court into effect), complained of in the said appeal, may be reversed, except such part 'of the said interlocutor of the said 28th July as remits the bill of advocation and cause 'back to the said Commissaries; and that the interlocutor of the said Commissaries of 'the 23d June 1747 may be affirmed. And thereupon the several interlocutors complained of were read, and the Counsel for the respondents being likewise heard, and 'consenting thereto, it was ordered and adjudged by the Lords, &c. that the said interlocutor of the Lords of Session of the 28th July 1747, except such part thereof as remits the bill of advocation and cause back to the said Commissaries, and the said 'interlocutor of the Lord Ordinary in respect thereof, of the 29th July 1747, and also 'the two interlocutors or sentences of the said Commissaries in consequence thereof, 'dated the 5th and 6th August 1747, be, and the same are hereby reversed; and it is 'further ordered and adjudged, that the said interlocutor of the said Commissaries of the '23d June 1747, be, and the same is hereby affirmed.'

Then the Records bear an entry, 'that the Judges do prepare and bring in a bill for 'the better preventing of clandestine marriages.'

The effect of the judgment of the House of Lords was to send the case back to the Commissaries, to receive a proof from Mrs Kennedy. This accordingly was done.

The substance of Mrs Kennedy's averments were as follows:—She had been addressed by Carrick (Campbell) when she was very young; but his estate being encumbered, he was obliged to go to sea. Before he returned, she had married, and had become a widow. When he came back, he publicly renewed his addresses to her, she then having a house in Paisley, but chiefly living in the Abbey there, (the residence of her godfather the Earl of Dundonald), with her cousins the Countesses of Strathmore and Galloway. She and Carrick were married in the Abbey by Mr Cockburn, an Episcopal minister, on 3d July 1724, in presence of William and Archibald M'Intyre, two of Carrick's servants, and two of the Earl's who attended Mrs Kennedy. Cockburn, fearing the penalties, declined giving a certificate of the marriage; but Carrick gave her the following holograph certificate:—'At Paisley, the 3d July 1724. This day, I, John Campbell of Carrick, do 'hereby certify and declare, that I was solemnly and lawfully married to Mrs Magdalen Cochrane, lawful daughter to A. Cochrane of Bonshaw, Esq., now my dear wife; 'as witness hour, place, and date aforesaid, JOHN CAMPBELL.' Mrs Kennedy having a family, and only L. 600 of her own, and Carrick's money matters being deeply involved, and he owing largely to his uncle Ardkinlass, and depending much upon his relations, it was agreed to keep the marriage as quiet as possible. They, however, lived together as man and wife, as far as was consistent with secrecy. By degrees, however, the matter transpired, and the marriage came to be reported and believed at Paisley and the neighbourhood. She took a house in Edinburgh, and Carrick, who had raised an indepen-

King's Advocate. By the law of Scotland there are only two kinds of marriage—regular and solemn, and irregular and clandestine. The first must be attended with all the requisites demanded by the June 20. 1828.

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dent company in a Highland regiment, resided with her, as her husband, as often as his military duties permitted. Having, however, become very uneasy that her marriage was not published, she pressed him on the point. On an occasion of his absence, he therefore wrote her as follows:—'Camsail, 4th November 1725. My dear Maudie,—I 'am just now in a very great hurry, and I beg you will not be uneasy; and in a few days 'I design myself the pleasure of seeing you, in order to declare publicly our marriage. 'I hope it will be to the satisfaction of us both. Sure I am it will be to my dear 'Maudie's most affectionate husband and slave, JOHN CAMPBELL.' Directed to 'Mrs 'Kennedy, at her house in Edinburgh.'

In the mean time (1725) he had formed a connexion with a lady named Jean Campbell, daughter of Campbell of Mammore, which he thus communicated to Mrs Kennedy:—'1st March 1726. My dearest wife,—Allow me still to call you so. The con-'tents of this letter will certainly astonish and confound you. Unable as I am either 'to write or act as I ought to do with regard to any thing, I must acquaint you with 'the most melancholy and terrible misfortune that ever happened to a man, who had 'nothing in view but to be happy, in doing all the duties of a regardful and most af-'fectionate husband, to the best and most dearly beloved of women. But, alas! how 'have I deprived myself of that happiness! how justly have I forfeited that honest and 'sincere love I might have expected from you, my wife, my friend, and only joy in 'life, and to which, from our mutual engagements and marriage, I had a real title. 'Miserable soul that I am! I have lost all hopes of comfort by the snare of a silly, 'worthless, and designing woman, whose repeated advances I always shunned, as I 'have done the devil, and to whom I never gave the least encouragement, and far less 'promises;—yea never thought of her. Yet, alas! how shall I be able to express it! 'Notwithstanding of the undoubted, just, and only title you have had, and always must 'have, to me as your husband, and whatever else can be called mine, which you can, 'when you please, make appear, and at all times claim me as such, I have, without 'giving myself time to think seriously, through fear of disobliging the Duke of Argyll 'and his friends, plunged myself in the utmost misery. You will by this time guess 'what I mean. Alas! What shall I say to my dearest Maudie? Though my hands 'are guilty, my heart is free. Oh, how shall I mention that fatal night, which has 'been the cause of all my woe, when, having drunk to a very great pitch, and sitting 'alone in the fields, that deceitful woman, or rather devil, whom the world now calls 'my w—e, and who on every occasion laid traps to ensnare me, designedly threw her-'self in my way. How shall I tell you what followed? My spirits fail me—I sink— 'I can no more. Ruin and destruction to me, by her ensnaring insinuations, and 'cursed lewd behaviour, and my not being master of myself, I did——Oh how shall I 'name it? She fell with child, which was all the devil wanted, joined with her vicious 'inclinations, to bring about her own end; and in horror and confusion of mind, for 'the reason above, and to prevent my flying the country, (reasons too slight, nay, not 'to be named when seriously thought on), have put myself in the damnable situation 'I am now in. Alas! why did I yield to the fears of disobliging the Duke of Argyll, 'or any bad treatment I might have met with from my uncle, by declaring our marriage 'to the world at the time it happened? Why did my dearest wife join with me in being 'silent in an affair, upon which our sole happiness in life depended? Why, nothing but 'her tender regard to her husband, though I have no reason to expect it, must be the 'only cause I don't meet her just vengeance, which I not only deserve, but the curse of

June 20. 1828. law of Scotland. Both are binding; but there exists between them this important distinction, that in the latter you are led into the inquiry whether consent was given, and for that purpose may

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'God, unless by sincere repentance he should forgive me. Alas! what shall I do? May I, 'who from my distressed soul on my knees beg forgiveness, expect it from injured inno-'cence in imitation of his goodness? Though you have a soul noble and generous, 'I on no other account deserve it. But, alas! pity me, who am ruined by a damnable, 'deceitful, little wretch, who has brought me under the guilt of the most inexpressible 'piece of injustice to the best and most deserving wife. Yet I must be unalterably 'yours.—I was so—I am so to the last moment of my life. Therefore, O dearest and 'most injured of women, let me from a broken heart and sincere repentance beg and 'conjure you to give peace to my troubled soul, by allowing me to see you, that I may 'more fully explain the miserable state I am in. Grant me this favour, that on my 'knees, and with a heart full of sorrow and contrition, I may ask forgiveness. Oh 'forgive, if possible, your greatly distressed and most unhappy husband, JOHN CAMP-'BELL. 1st March 1726.' Directed to Mrs Campbell of Carrick, at her house in 'Edinburgh.' When she upbraided him with his conduct in suffering Jean Campbell to live at his house in the country, he said his dependency disabled him from preventing it, and he threatened to leave the country if Mrs Kennedy actively interfered. This, and the increasing involved state of Carrick's affairs, (he being even obliged to sell his estate), and the ruin which would ensue to him if an open claim were made by her in the character of his wife, she stated, still induced her to be silent. Therefore, temporising for a while, she, notwithstanding his occasional intercourse with Jean Campbell, received him when he came to Edinburgh in May 1726; and when absent they corresponded together, like man and wife; and she had in her possession 126 more letters, all written as from a husband to a wife. She alleged, that before, as well as after, the second marriage, she had disclosed her marriage, and shewn her certificates, to several people, many of them of distinction; and he had got some of them to intercede with her not to make her claim then, and told them his life was miserable in consequence of his connexion with Jean Campbell. Mrs Kennedy also maintained, that Jean Campbell and her friends knew of the marriage with Mrs Kennedy; and that she (Mrs Kennedy) and Carrick had lived and cohabited together at bed and board as man and wife, from the time of their marriage in 1724, at Paisley, Edinburgh, and Ostend, and other places, to 1744, for three, four, and five months at a time; and that in consequence she had in 1727–28 refused an advantageous match with another person. She also alleged, that Jean was with child to Carrick before the second marriage.

Carrick was killed at Fontenoy in 1745, and Mrs Kennedy obtained letters of administration to him in the Prerogative Court of Canterbury, as his widow, and applied at the War Office to be put on the establishment; but the agent for the regiment having signed a certificate for Jean Campbell, a question arose concerning the pension; and then Jean Campbell raised an action of declarator of marriage, and called Mrs Kennedy as a party. Mrs Kennedy also raised a declarator. The first part of the proceedings under these declarators is the subject of the report already alluded to. On the remit from the House of Lords, the Commissary allowed a proof; and thereafter, having considered Mrs Kennedy's libel, with depositions of witnesses, certificate, and written documents; and Jean Campbell's deposition and documents, 'and particularly the proof of Carrick and her '(Jean Campbell's) overt cohabitation as husband and wife from the beginning of 1726 'to 1743, when he went abroad with his regiment;' found, that Mrs Kennedy has not proved her prior marriage libelled; and therefore dismissed the process, and found facts, circumstances and qualifications, as proven by Mrs Jean Campbell, relevant to infer

look to the conduct of parties before and after the ceremony: in the former, consent is inferred from the very ceremony. Now in the present instance there was no proclamation of banns. June 20. 1828.

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marriage; and found that the deceased John Campbell of Carrick and she were husband and wife. Mrs Kennedy advocated, and the Court refused the bill.

Mrs Kennedy appealed, repeated the foregoing statement of facts, with proof adduced; and argued,—1. Marriage is a contract indissoluble by the consent of parties; and if it be properly proved, no Court of law can deny such marriage its legal effects. During its subsistence, no second marriage can exist—a second marriage must be an absolute nullity and void; and such second marriage, in whatever manner contracted, and attended with whatever circumstances, can create no objection to establishing the prior marriage. 2. Subsequent conduct will not annihilate the marriage, nor make the second wife the lawful wife of Carrick, who is the lawful husband of the appellant. 3. The appellant has proved her marriage; but it is said, that the second marriage has been proved by lines and witnesses. The answers are,—1. A first marriage having been positively proved by certificate, letters, acknowledgment, declarations, writs, facts, and circumstances, previous and subsequent to the respondent's intercourse with Carrick, any other marriage is thereby rendered impossible in law. 2. Polygamy may be proved, but not that the appellant had ceased to be Carrick's wife, or that Jean Campbell could become his wife; but there is no satisfactory evidence of Jean Campbell's marriage. All she says is, That 'she was married near by the 'house of her parents, in the parish of Roseneath.' The witnesses are the same as those to the appellant's marriage, but they take their lowland names, a very suspicious circumstance, they being at the supposed time in the Highlands. As to the church censure, that would not constitute marriage, or renew vows; besides, there is no instance of church censure for a clandestine marriage. The censure before the kirk-session related to what had passed in the fields. It was also said, that if there had been no other marriage in competition, the appellant may have brought a sufficient proof of her marriage; but a proof, however available in the common case, cannot apply to the present case, where the consequence would be the annulling of another marriage. The exceptio doli bars the appellant from taking her declarator, and nothing else than a proof of an actual marriage would suffice. As Jean Campbell was silent all Carrick's lifetime, she ought not now, after his death, to be permitted to avail herself of her marriage, or any proof she holds of it. But to this it is sufficient to answer, That there is no difference between the proof of a marriage in a question with a husband and in a competition: what is good against a husband is good against all the world; and here has been given a proof of actual marriage. There is no exceptio doli. Mrs Kennedy created no damage. It is in proof, that Jean Campbell heard of Carrick's courtship with Mrs Kennedy in summer 1724, and of their marriage; so must blame herself. But Mrs Kennedy was ignorant of the second marriage; and when she did hear it, the entreaties of Carrick prevailed to keep her silent. The plea of personal exception was disposed of by the House of Lords.

Mrs Jean Campbell and daughter, respondents, stated their case as in the report before referred to, and founded on the marriage certificate, register of births and burying of her children—a conveyance of Carrick's of certain lands to creditors, to which Mrs Jean Campbell, as his wife, is a party—an assignation to certain rents and profits, where the respondent is made to hold the same character—on declaration of witnesses to the marriage—renewal of vows, and promise of adherence before the kirk-session of Roseneath, which had been scandalized at the irregular marriage—cohabitation as man and wife, and procreation of children—reception and treatment as man and wife by people of consequence

June 20. 1828. There has not been produced even a certificate of proclamation. The story of Jolly burning the certificate is unsupported. The extract from the register of marriages kept by the Session-

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and fashion—the express and tacit acknowledgment by the appellant herself—and on fifty-one letters from Carrick to her, of which the following is one from Flanders:—'August 1744.—My ever dearest Jeanie,—This, if it comes safe to hand, is the 'eleventh letter I have wrote to you without knowing whether you are dead or alive, 'but by second hand. This, if I really love you, must give you the utmost pain, 'which, as I hope to see God in mercy, I do sincerely from the bottom of my soul, 'as much as husband loved a wife. This I am determined to do to the last moment 'of my life, in spite of all who think otherwise. If you have heard villanous stories of 'me, don't give ear to them, for they must be owing to a certain wretch who deserves all 'the mischief in my power, and whose face I'll never see. You may guess who I mean. 'As I am told by Mr A. Campbell that my estate is sold, and there will be some reversion, 'I hereby give a right all the days of your life to the reversion, and all my household furniture and moveables; and I desire that you'll immediately cause A. Campbell draw 'up a right in your own favour, and send it here to me to sign, and I shall return 'it as soon as possible. I send my blessing to my children.' Mrs Jean Campbell also produced nine letters to her from Colin, brother to Carrick, and several from Carrick's uncle, and eleven from Carrick to her mother, acknowledging her (Jean) as his wife. She also proved by witnesses that her marriage had never been challenged, and that until 1745, when he was killed at Fontenoy, she and Carrick had cohabited together, and been received as man and wife, by friends, relations, and acquaintances. Even Mrs Kennedy had visited them, and treated them as man and wife. Clara M'Caulay, wife of the Provost of Edinburgh, deponed, that in 1728 'the said Carrick 'having been invited to dinner at the house, he came up in the forenoon to the deponent, and desired as a favour of her, that she would invite his wife (the respondent) 'and Mrs Kennedy (the appellant) to dine with her that day, because he wanted to 'have his wife made acquainted with Mrs Kennedy. That the deponent did invite 'the appellant and respondent accordingly, who both came; and while they were together, Carrick came into the room, and, in the presence of Mrs Kennedy, did treat 'the respondent as his wife, and the appellant as Mrs Kennedy. That the deponent 'treated them so likewise, and that the two ladies conversed with each other under the 'character of Lady Carrick and Mrs Kennedy.' Mary Campbell swears, that 'soon 'after the respondent's and Carrick's marriage broke out, they came to the deponent's 'mother's house, at Stirling, as husband and wife, where they staid some days and 'nights. That during their stay, there was one room and bed prepared for them in the 'said house, where, she believes, they lay. That Mrs Kennedy was all the time of this 'visit in the deponent's brother's house, and had a separate room and bed prepared for 'her. That at the time of the said visit, the appellant assumed the name of Mrs 'Kennedy, and was treated by Carrick and the family under that character; and that the 'deponent, her mother, and the whole family, behaved to the respondent as Lady 'Carrick.' Mrs Jean Campbell also proved express denials by the appellant of any marriage between herself (Mrs Kennedy) and Carrick, and acknowledgment that Mrs Jean was Carrick's wife. Lady Schaw deponed, 'that being at Glasgow, and hearing Mrs 'Kennedy was there, the deponent sent for her, and told her that she was sorry to hear of 'her keeping a criminal correspondence with Carrick; to which the appellant answered, 'that, as she should answer to God, she had no correspondence with Carrick farther than 'a kiss of civility when he came to Edinburgh or left it; that in her widowhood Carrick had proposed marriage to her, which she had agreed to; but he proposed first to

clerk of Edinburgh, is neither a certification of proclamation nor of marriage. The assistant to the session-clerk only speaks inferentially, and the certificate of Joseph Robertson, independent of the discrepancy in point of date, is utterly unworthy of credit. The best proof that this was an irregular and clandestine marriage is to be found in the conviction of Joseph Robertson for having cele- June 20. 1828.

'go home and put his house in order, after which he was to return and marry her; 'and in the mean time, when he was at Roseneath, he married Mrs Jean Campbell; 'and concluded by promising deponent that she would never see or entertain Carrick 'more.' M'Millan (one of the appellant's witnesses) deponed, that 'Provost Camp-'bell and Carrick talking together concerning Carrick's keeping company with the 'appellant, Carrick promised the Provost that he would see the appellant no more, and 'have no further correspondence with her.' And it was sworn by Mrs Susanna Campbell, 'that a little before Carrick left Scotland, when he was at Camsail (Carrick's house), 'the deponent came into his room, when she saw several letters lying, which he threw 'into the fire; and the deponent having asked what he was thus burning, he answered, 'that they were the damned whore Mrs Kennedy's letters; and the deponent owning 'that she had abstracted two of them, he begged of her not to shew them to the respon-'dent his wife, for that she had got but too much grief and trouble by letters of that 'kind already.'

The respondent further led evidence to shew that the knowledge of the first marriage was not extensive; and proved by doubtful witnesses that Jane Love, a sergeant's wife, who swore that Archibald M'Intyre, when he thought he was dying, told her that he had been witness to Mrs Kennedy's marriage with Carrick, and that she had asked him to write what he had said, but he affirmed he could not write, whereas it was proved that he had been seen to write; and John Cunnison, who swore to Carrick and the appellant revealing their marriage to him, and M'Intyre's declaration of having been a witness to the marriage, were certified to be of infamous character. Of the two surviving (out of the four) alleged witnesses to the ceremony, one, a female servant at the Abbey, only knew of the marriage three years ago, by a letter from the appellant, who afterwards told her the reason why it was kept secret from her was, lest she (the deponent) got anger from the ladies; and the other, the man servant, only had heard the marriage whispered by others. He also said, he had heard from others that Cockburn had been at Paisley at the time; but Cockburn's wife deponed, that she and her husband left Glasgow in 1714; that he never afterwards, to her recollection, was in the west country; and they, during the year 1724, resided in family in Edinburgh. Besides, the appellant by her conduct shewed that she did not regard herself as married; and the certificate on which she founds, is not signed by the minister or witnesses. And the letters which had passed cannot vary a right, nor establish a marriage, which wants the essential qualifications required by law. Whatever proof may be needed of a marriage, by consummation or cohabitation, when parties are free, nothing short of the most pregnant proof is sufficient to annul a subsequent marriage followed by consummation. That would hold even if the claim had been de recenti, but here the party delayed until the husband was dead. The appellant could not after Carrick's death set up the claim of marriage; but was barred personali exceptione and exceptione doli. If the appellant's pleas were listened to, no women or children would be safe, but any literary correspondence which parties chose to keep up, would bastardise lawful issue.

The House of Lords, 31st January 1753, ordered and adjudged, that the said appeal be and is hereby dismissed this House, and that the said interlocutors, and final decreet or interlocutor of the said Commissaries, be, and the same are hereby affirmed.

June 20. 1828. brated irregular and clandestine marriages; therefore you can inquire from circumstances, whether there was exchanged at the ceremony at Joseph Robertson's a true real consent ad consortium vitæ. Indeed, the judgment of the Commissaries opens that inquiry, and the Court of Session, on the first advising, allowed a proof on this very point. But the whole conduct of parties is utterly inconsistent with the idea of actual marriage. It is plain that M'Gregor had been preparing his witnesses to found the present action. According to his own account, he saw the defender with Jolly not many days after the marriage at Joseph Robertson's, and resolved to take instant measures for obtaining a divorce; and from that time all intercourse between them as married persons ceased. How is it possible that after this alleged separation she still could be introduced by him as his wife? Besides, at the very time that he maintains he so introduced her, she was undeniably living publicly at bed and board with her husband, Mr Jolly, with the sanction of her father, and recognized as Mrs Jolly by all the visitors of the family. It is therefore quite impossible to hold that there had taken place at Joseph Robertson's any consent ad ipsum matrimonium; and without that there is no marriage. Even were this House to be constrained by evidence to affirm these judgments, you would see good cause to separate the matrimonial conclusion from the conclusion as to civil rights; for no Court of Justice would lend itself to the base mercenary plans and designs which the respondent entertained, and which indeed he hardly disavows. The conduct of the appellant is quite susceptible of explanation, when it is recollected that she was a natural daughter, and that the respondent (who possessed considerable influence over Dr M'Neill) had the possession of the mortis causa settlements, on which depended her whole hopes of succession, and which deeds he threatened to destroy. Even what passed at the alleged ceremony before Joseph Robertson is buried in obscurity. Women are not the best—are scarce admissible witnesses; and even Mrs Robertson has to be tutored by having the book of marriages put into her hands. The witness Nicolson, who is represented as detailing the appellant's confession of marriage, is unworthy of credit.* In every view

* The appellant's Counsel having occasion to quote from an appendix to the appellant's case, which appendix, through accident, had not reached their Lordships' table, Earl of Eldon said, 'This paper, not having been laid on the table, cannot be alluded 'to. Your Lordships can, however, require it to be now produced. The rule is, that 'no papers can be read that are not on the table; but the House can call for them; so 'we can call for them yet, and in that way give them an entrance into the House.

Mr M'Gregor's conduct cannot be visited with too much censure. It was a conspiracy against the appellant's peace and fortune. He laid his plans so as to be free or not, according as she might or not truly succeed to her father's property. But if so, and looking to the whole res gestæ of the case, even were the Court to decern in the marriage, it would be prostituting the power of a Court of Justice to force the appellant to adhere, or cohabit with, or communicate any part of her worldly substance to the respondent. The Court sequestrated the estate while the subsisting status of marriage remained, and therefore may separate the patrimonial interests which were granted in contemplation of the consortium omnis vitæ from the abstract status; and personal exception is plainly competent to bar a patrimonial claim. June 20. 1828.

Respondent. (Dr Lushington). The case could not have been more fully argued, had the second husband and children been parties. All the facts have been stated, and terms of vituperation of no ordinary cast employed; but the decision of the case does not depend upon the usual conduct of the respondent, or on morality, at all. The sole point raised is, What is the legal *status* of the parties? The only finding that has yet been pronounced in the Courts below is, that there has been a marriage between the respondent and the appellant. There has been no decision of adherence or cohabitation. Now is, or is not, that finding well founded and supported by the evidence?

Earl of Eldon. I observe the concluding words of the interlocutor of the Commissaries are, 'and decern.' Have these words no reference to the whole conclusions of the summons?

Dr Lushington. I shall come to that afterwards; at present, I only say, that these words import a mere declaration of marriage.—I am still, however, quite willing to argue now the question of adherence.

Earl of Eldon. I am very sorry to interrupt Counsel,—there is nothing more painful to me. But if we are to understand this interlocutor of the Court of Session, as an interlocutor which has not as yet determined (but as being the foundation of some future proceeding) that the parties are to adhere,—that the words 'and decern,' in this interlocutor, have no reference to the conclusion for adherence; then we have no right to discuss here that question, whether the Court can or cannot order

'I move, therefore, that the appendix be produced, and then the Counsel will be at 'liberty to remark upon it.'

June 20. 1828. an adherence. That not having been determined in the Court below, we cannot begin it originally here.

Dr Lushington. That is the very argument I mean to address to your Lordships when I come to that part of the case. If I fail in shewing that the judgment merely declares a marriage, then I shall proceed to the question of adherence. But, in either view, I must state the facts to be understood. I shall not go into the argument as to the probabilities of affection between the appellant and respondent; It must be admitted, that such connexions are not a matter of the greatest impossibility. Neither shall I inquire into the habits of the parties: As Mary Black M'Neill was educated in very humble life, there was less inequality in her match with M'Gregor. Also, the mortis causa settlements shall be passed over: It may be admitted, that this consideration made a strong impression on Malcolm; so it made on Jolly. As to the iniquity of marrying for money, that is a point on which inquiry may be safely abstained from. It has been complained, that the respondent alleged a marriage at Holytown, and did not prove it; but how could he, when Dr M'Neill, who celebrated it, is dead? Then, it is said, no notice was taken of the marriage with Jolly; but the summons only required to be composed of a statement of facts, sufficient to support the conclusion of declarator of marriage. The statement of the second marriage is only defensive. If nothing had been said in the defence of the second marriage, there might have been room for a charge of collusion, but it was not a necessary ingredient in the summons. It has been stated, that the second marriage (before Dr Robertson) was a valid marriage: I admit most distinctly that it was, provided that the appellant was not already married to another person. Now, had she been already validly married? To the regularity of the marriage, I shall proceed afterwards. The first marriage (I shall call the first marriage that before Joseph Robertson) is established, 1st, By the certificate of marriage-lines having been granted; 2d, By witnesses present at the ceremony; 3d, By Joseph Robertson's register; 4th, By certificate given by Joseph Robertson; and, 5th, By the appellant's admission in judicio, and before witnesses. It has, no doubt, been argued, that the conviction of Joseph Robertson taints the evidence; but this objection has been put with more strength than safety. Would his conviction taint the 1050th marriage recorded in his book? The good sense of the matter is, that if you can connect any marriage with the very act of iniquity of which Joseph Robertson was afterwards convicted, then the

evidence of that marriage would be shaken, but you cannot go farther back. It would be monstrous to visit on an innocent person the subsequent guilt of the clergyman. It has also been alleged, that women are not competent witnesses; but that doctrine has been long exploded. There is no apparent bias or motive, why the female witnesses here would not give their evidence truly; and unless they have been guilty of gross perjury, it is impossible to doubt that a valid marriage was solemnized before two of them. Slight discrepancies are not to be attended to. Indeed such discrepancies are the strongest proof of veracity. You want witnesses agreeing to the main points, not on matters which, from their very nature, are calculated to make slight impression on the mind. Besides, the very infirmity of recollection destroys the suspicion of wilfully supporting, against truth, the pursuer's case. As to the book shewn to Mrs Robertson, it was properly put into her hands to be proven as an exhibit. The want of memory as to the precise date is of no consequence, for that a marriage was solemnized is proved beyond doubt. It was admitted by the appellant, when visiting her friends; and the conversation they swear to is good evidence as forming the res gestæ of the case. The book of marriages was produced, and it is proved to have been in the handwriting of Joseph Robertson. It is said that it is not evidence; but the original of a private document is evidence. The book of marriages by a dissenter must be proved; but even a copy of a regular church marriage is sufficient. But it is said, that the book is rendered a nullity by the after conduct of Joseph Robertson, since it is not the conviction but the offence which destroys his credit. Be it so. Then we look to the time of the offence, and we find it long posterior to the entry of this marriage. Besides, are all acts of a clergyman to be impugned by the mere act of future crime? Is the evidence of parties' status to be destroyed by a future conviction? That is impossible. But where are you to fix the time of incapacity? Take a witness to a deed 25 years ago. Is his evidence to be destroyed because he is afterwards declared infamous? The interests of third parties must be protected. The rule is, that a party is not bound to know that a person has been guilty, until the sentence declares it—until the conviction, he is a good witness. June 20. 1828.

Earl of Eldon.: Is there any evidence to shew when these entries were made? The appearance of the book affords some evidence on that point,—there can be traced the same pen and

June 20. 1828. the same ink in distinct entries. How could a minister certify that a marriage took place on the 29th May, when it had been celebrated on the 23d?

Dr Lushington. The clergyman does not certify that a marriage took place on the 29th; but he, on the 29th, certifies that a marriage had been celebrated.

Earl of Eldon. Then this point remains:—Is there any evidence, other than this book affords, of the precise dates of these entries? What could the clergyman certify in consistence with the appearance of the book itself? Look at the fifty-three omitted marriages. The book is a very curious book, and well worth looking into.

Dr Lushington. I have not had that opportunity. But after all, the book is of no great importance. It is only one item in the evidence. Then see the appellant's defences, the important and decisive admission of this very marriage. It is no doubt said, that her Counsel was absent when the defences were drawn; but I am not aware of any general abruption of Counsel at that time from Scotland. But if so, it is more likely that truth would step in, and give us a statement that could be the more relied on. She then admits having received M'Gregor's addresses, and having gone to Joseph Robertson's. She says nothing about the burning of the deeds, of which we afterwards hear so much. She also admits, that she returned with M'Gregor that night to her father's house. All this is corroborated by the conversation after this action was raised. The objection to the witness Nicolson is unfounded. She was, at least, not the mistress of M'Gregor at the time of the marriage; and even if, anterior to that, she had children to him, it would not affect her evidence; or if it did, it would make it unfavourable to M'Gregor, since the supposition of a marriage to another person would destroy her hopes of being married to him herself. As to the lines, there is evidence that Jolly burnt them. No doubt a marriage can be annulled on ground of force or fear. It is true that the ceremony of a marriage is not to be taken as probatio probata (as the Scotch express it) of free consent. If force, such as would induce a party to succumb, has been practised, then certainly there is no marriage; but the person who sets up force and fear as the ground of objection, must prove it,—on him the onus probandi lies. Indeed the allegation only is, that the threats were directed against Mr Jolly. But that is not what the law requires: The fear must be personal to the party, him or herself. Besides, for two years and a half the appellant remains with

this force and fear concealed in her breast; nay, immediately after it had been excited, she walks home with the delinquent; and, instead of seeking assistance from the passengers in the street, claiming the aid of Joseph Robertson's family, or of unbosoming her wrongs to her household, she retains him as her special friend; in short, no sooner is the pretended offence committed than pardoned. It is clear, therefore, that these charges of fraud or fear are mere matters of invention. Even the alleged claim for the title-deeds had no grounds; for there is no evidence that, at that time, they were in M'Gregor's possession. But there having been a prima facie good and valid marriage, how can any verbal evidence be admissible to prove want of consent, neither force nor fear having entered as ingredients in the case? The danger that would arise from such a course of proof is so manifest and alarming, that had it not been for the observation of one of your Lordships' number, I would not have felt very justified in raising it. But I am thus necessarily led to inquire, what the marriage law of Scotland is? what species of marriage this is? if any proof of absence of consent can be admitted as to any Scotch marriage? and if as to any, then if it can be admitted as to this one—always presuming that force and fear are absent? June 20. 1828.

There are in Scotland several modes of marriage:—1st, By proclamation of banns, and a marriage celebrated by a clergyman in facie ecclesiæ; 2d, By a certificate of proclamation of banns, though no proclamation has de facto taken place, but where there has been a celebration by a clergyman; 3d, By an interchange of consent per verba de præsenti; 4th, By a promise cum copula subsequente; 5th, By cohabitation as man and wife. In the last three cases, proof may be received of no consent, and Scotch Courts do receive such evidence in these three situations ex necessitate of the case; for consent, when inferred from the verba de præsenti, may be dubious; for the verba themselves may be ambiguous, and misunderstood; so likewise there may have been misapprehension in the 4th and 5th situations. In these three, no outward ceremony has interposed to imbody consent into a formal contract; and, therefore, evidence of consent or of its absence is let in. The question, whether evidence can be let in of no consent, to rebut the force of any of these three last kinds of marriage, is fully stated in the Dalrymple case.

Earl of Eldon. Could you shew me the libel in that case; for I observe, that that case concludes with the consideration of the question, if a copula subsequent to promise had been proved,

June 20. 1828. and whether there had been a consent verbis de præsenti; and the question reasoned upon was, whether consent verbis de præsenti, with that copula, would make a good marriage?

Dr Lushington. Both points were put in issue.

Earl of Eldon. The question turned thus: Is it necessary to consider the first point, as consent verbis de præsenti, where it is clear that there was a copula following promise? Now what I want to know is, whether the first point that was reasoned upon by the Judge was raised by the libel?

Dr Lushington. The libel merely alleged a marriage generally, and the whole cause was before the Court, first, whether there was a consent verbis de præsenti, and next a promise cum copula subsequente?

Earl of Eldon. I thought that there was an infinite deal of learning in the judgment, and also in the evidence given by the learned gentlemen in the profession in Scotland; but it did really occur to me, that after reading that judgment, (and perhaps I may be allowed to take some liberties with it), that a vast deal of learning and expense had been thrown away; because the evidence of promise cum copula was not clearly made out.

Dr Lushington. The Scotch law was at the time very much unsettled; and there was a question, whether a promise cum copula might not be rebutted? We had an argument as to the medium impedimentum. No doubt that was quickly brushed away by the Judge. But to some Counsel it seemed of weight; and indeed Lord Kames treats it gravely as well founded. No doubt it is said, that on some points his Lordship is not a very safe authority.

Earl of Eldon. In the judgment in Dalrymple's case, the Judge did not appear to have had the least doubt, that if there had been a promise cum copula, that would have been sufficient to constitute marriage; nor to have had the least doubt, (nor could any person who knew human nature have doubted), that there was a copula following the promise; therefore, there being no doubt that there was a promise and copula, it appears to me that the latter part of the judgment would have done without the former; though I think we are very happy in having it.

Dr Lushington. The authority of Erskine is to be sure against us; but he stands single against a host of writers, and opposed to the opinion of the most celebrated lawyers in Scotland.

Earl of Lauderdale. He is supported by the cases of Campbell against Cochrane, and Young and Allen.

Dr Lushington. I shall not allow these cases to pass unno-

ticed; when examined, they will prove to be no authority on the point they are brought forward to support. June 20. 1828.

Earl of Eldon. The reason one of the Lords, I think myself, took the liberty of desiring that this point might be attended to in the argument was this, That supposing you to be right in your argument which goes to support the interlocutor of the Commissaries, I doubt very much whether that interlocutor does not contain in it words that might lead to the inference that such evidence (of want of consent) would be admissible; and the rather, because the Court of Session seem to have argued a great deal on facts and circumstances which, connected with what I find in the body of the Commissaries' interlocutor, (which cannot but be taken in this House to be a judgment of the Court of Session), would lead to the inference that that evidence could be admitted, even if you had had a regular marriage. We therefore wished so very important a point, in this very important case, should not be passed over in the argument.

Dr Lushington. My intention is to advert particularly to that matter. It is an inquiry most important in its ultimate results. I do not find that it has been even treated in the works on Scotch law, as a simple question of law. Indeed I have found there nothing to bear on it. I have stated, that evidence of absence of consent is admissible in three of the modes of celebrating marriages: Now, on what reason and principle is it, that, in marriages of this description, you are permitted to shew that no consent had interposed? If I can find a reason why such evidence is admissible there, then we shall see if the same reason applies to marriages before clergymen, or if these *two* classes of cases do not depend on totally different principles. I can account for the admission of evidence in the *three* classes: It is, that in these there is nothing which ex necessitate imports full and free consent. There is no form—nothing to remove uncertainty—nothing to put beyond all doubt what the intention of parties was at the moment. Take the case of a marriage constituted verbis de præsenti: As the law has not pointed out any precise words for the occasion, or appointed witnesses,—as there is no solemn ceremony, nor precise form,—therefore there must attach to it the greater degree of uncertainty. Parties can use their own terms; and in these very expressions there may be doubt and ambiguity whether parties meant to imply consent or not; and therefore, because there might be every degree or gradation of uncertainty, it became necessary

June 20. 1828. to let in evidence to shew what had truly been the view of parties; and thus the evidence would be more or less according as the ambiguity was greater or less, and all the particulars of the conduct of the parties came to be examined. Elucidation might have been necessary, to ascertain if the words had been seriously uttered, to create a consent de præsenti, with a view to marriage, or that they were not intended for that purpose; and this for the best of all reasons, because the law had not presented any precise form to be adopted. Still the enunciation of such a propotition, even in such a case, struck the Judge in Dalrymple's case with something little short of astonishment, that, where the words were clear, a different interpretation should be affixed by circumstances. In the same way, as to marriages by promise subsequente copula, evidence is admitted to shew, for instance, whether the words imported a promise. As to the other species of marriage, by habit and repute cohabitation, the necessity of letting in evidence seems greater; for it is utterly impossible to say what is habit and repute inferring marriage, without the aid of extrinsic circumstances. It is a mistake to say that in Scotland a marriage can be constituted by mere cohabiting as man and wife. That violates the first principles of the law of marriage. The true view is, that cohabiting shall be taken as a circumstance whence may be elicited the fact of a previous consent to marriage being given. Marriage is not constituted by the cohabiting, although the cohabiting is strong evidence of the previous consent. And here, therefore, the reason is strong for admitting extrinsic evidence; for if cohabiting were sufficient, then all who chose to live as married people, to conceal their illicit connexion, would become married, contrary to all principle, as construing a marriage where there had been no consent to marriage. Thus, sound principle has sanctioned the admissibility of evidence of circumstances to explain the acts of the parties in these three cases, and to shew that there was or was not consent. Now, do the same reasons exist as to marriages celebrated before a clergyman? Are there the same doubts to justify the introduction of the evidence of subsequent conduct? I assume that the law directs that no marriage shall be esteemed regular, unless it be before a clergyman. All others, although valid, are irregular, and the parties concerned are, by the law of Scotland, subjected to punishment. Formerly there was a prescribed ceremony for celebrating regular marriages, (see Directory for Public Worship, 1641), and joining hands appointed; but now, in point of practice, there is none. Still, though different clergymen use different forms, these are

the same in essence. The form necessarily contains, (for we must presume that all clergymen do their duty), 1. An express inquiry if the parties do consent; 2. An expression of assent by the parties to marry; 3. A declaration that they are married; 4. The nuptial benediction; which last takes place whatever be the form of ceremony used by the clergyman officiating. Now here is something greater, and more certain, and more binding, than in any of the other three modes of marriage. From a ceremony like this no doubt can arise as to the purpose of parties. Marriage is not a mere civil contract. There are ample authorities for the contrary opinion. The law of marriage is founded on the canon law; and although, in compassion to the weakness of human nature, a valid marriage may be constituted without the intervention of religious rites, yet it is not regular, unless a benediction has been given by the clergyman. Accordingly the Judges, in deciding marriage or not in the three last classes enumerated, consider whether what has been done by the parties to these irregular marriages is equivalent to the solemn consent before a clergyman. You will see that the first ingredient in a regular marriage, which does not exist in the irregular, is the presence of an individual appointed to have controul over marriages—to officiate—the only agent through whom the marriage can be had; all other marriages are punishable by law. Now if an act be done according to the forms prescribed by the State, no one can deny that the force of the obligation is greater than when the act is done in any other way. The maxim 'omne 'rite,' &c. takes place with more force when parties act in obedience to the law, than when violating the law by irregularly attempting to do the same thing. That is one reason why no extrinsic evidence is admitted where marriage is regularly celebrated in facie ecclesiæ. In these circumstances, the parties must know what they are about. They cannot be ignorant what they are doing, for it is the duty of the clergyman to make that fact known to them. This does not exist in irregular marriages. The expression of consent must be indubitably conveyed to the clergyman. It may be done in various ways. Where there is no force nor fear, a bow or curtsey, or silence, is as conclusive an answer to the question as words could be. Then comes the invocation of the blessing of the Deity upon what has been done. There is thus superinduced the solemn sanction of a religious rite. The parties thus profess in the face of Heaven that they are married persons. Now, observe how completely all these ingredients are absent from the other three classes,— June 20. 1828.

June 20. 1828. marriage verbis de præsenti, promise cum copula, and habit and repute cohabitation. In a regular celebration there are every means of seeing that the contract is validly entered into; and I don't know what more the law could do to effect that purpose than by appointing a proper officer, a form, and the interposition of the expression of solemn consent, whereby the precise meaning of parties must be ascertained and appear. I therefore contend, that, so far from there existing any necessity for parole evidence, the act itself overpowers any result that could arise from parole evidence. The presumption overwhelms circumstantial evidence, which from its very nature must always be of doubtful character. There may be, no doubt, in a century, a case where actual consent is absent, but in ninety-nine cases out of a hundred these precautions insure solemn and deliberate consent, and prove its existence. I say consent may be absent—I mean that a party may be reluctantly consenting. But are we to try to dive into the breast of mankind? Is it not well known, that there are many marriages where the hand seems willing, but the heart would be found absent if the secret could be wrung from the party? But would that be a good reason for impeaching the validity and binding efficacy of the consent so given? The law goes farther. It says, if you willingly go through this form, you must be bound by it. You shall not turn round and put the institutions of your country to a different purpose than they were intended to protect. But observe how replete with danger would be the admission of evidence to rebut the consent given in a regular marriage,—destruction to the comforts of families, and to the foundations on which the dearest relations of life stand. Look at it, whether as relating to the parties, to their issue, or the public. Besides, to allow a woman to contradict all that has passed in facie ecclesiæ, is to permit her to prostitute a sacred rite. It is allowing her to say, 'I came of my free will, '—there was no force nor fear,—but I had a mental reservation. 'The ceremony was a solemn mockery,—a mere idle form.' But no Court could permit such language. There is no limit to the crime which such doctrine would create. It would tempt a wife, who was beginning to be estranged from her husband, to deviate into infidelity. She would only have to marry to give her the means of escaping from the first vows; for the very act of bigamy would operate as a proof of there having been no consent to the first nuptials. The appellant's doctrine is, not only that you shall be able to free yourself from the first marriage, but that you shall be encouraged to do so. But it is said, that

although it may be true that the proof of no consent is inadmissible where there has been due proclamation of banns, it is admissible where that form has been omitted. Now, letting alone for a moment whether there is any sound reason for this distinction, does it exist in the law? The objection is, that without actual proclamation of banns, there has not been a celebration in facie ecclesiæ,—that the marriage was irregular. Now look to the meaning of the terms regular and irregular marriage. A regular marriage is one celebrated in such a form that the clergyman and the parties do not render themselves punishable in celebrating and contracting it: an irregular marriage is one which no doubt is valid, but subjects the parties to penalties for violating the law. It is quite true that proclamation of banns is, in the strictness of law, required. It is equally true that here there was no actual proclamation. But in practice proclamation did not take place, and was not necessary to take place. It has long been the custom, a custom sanctioned by the lapse of time, to allow a certificate of the parish-clerk to stand in lieu of it. It is the substitute universally in use. Then comes the question, if such a practice be wholly illegal? or whether the maxim communis error, &c. does not apply? If you hold that the certificate is not a valid substitute, you would annul a very great proportion of the marriages in Scotland. The proper view to take is, that where a marriage is celebrated in pursuance of a certificate of proclamation by the clerk, who is the officer of the church, the certificate affords legal evidence, which cannot be controverted by any proof that de facto no publication had taken place. To maintain the reverse would render irregular a very large proportion of marriages in Scotland, and would open the door to impeachment by parole testimony of the consent given before the clergyman. It is impossible to see where the matter would stop. But it is said, that the contrary has been established by the High Court of Justiciary, to which we must all bow without doubting. But the conviction of Joseph Robertson has no bearing whatever on the present question. Indeed the strongest proof that a certificate is not traversible, is to be found in the criminal law of Scotland. Besides, it is perfectly manifest, that when we are talking of proclamation of banns, it has nothing to do with the question of consent at the time of the marriage. A party can resile after banns have been proclaimed. Indeed one of the parties is seldom privy to the publication. The inquiry, therefore, has no bearing on the point of consent, and consent before the clergyman is the essence of marriage. Proclamation was intro-

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June 20. 1828. duced, not in relation to consent, but to put people on their guard, and save from alliances within the forbidden degree of affinity. The cases quoted against us do not apply, or they may be reconciled with the principles just laid down; for in a marriage, besides consent, there must be an understanding to comprehend; and the want of understanding, from extreme youth, would annul a marriage as much as the want arising from idiocy and lunacy. But there was no extreme youth here; and except these cases, there is no authority for establishing so dangerous a novelty as that projected by the appellant. But if such evidence be admitted at all, to what extent is it to go? To this the observation of Lord Stowell in the case of Dalrymple affords a satisfactory answer. But even if all kinds of evidence were admissible, and such inferences could be drawn as such general evidence authorizes, there is no absence of consent proved by the facts and circumstances of this case. There is a presumption in favour of marriage, that there was a true consent interposed. Now, the fallacy of the appellant's argument is, that he treats the conduct of parties as inconsistent with the idea of consent having passed; whereas it can only be treated as inconsistent with the sense of the obligations arising from the consent. But a breach of contract does not negative that contract. If bigamy could prove that there was no first marriage, there never could be bigamy. Besides, it would rather be a dangerous doctrine, that the more husbands a wife took, the stronger would be the evidence that there had been no real consent to marry the first. As to the point of consummation, it is admitted that the respondent slept the night of the marriage in the same house with the appellant; and is there any thing in her history and conduct to render the natural termination of such alliances unlikely? But it is said, that M'Gregor was privy to the marriage with Jolly, and that of itself was a proof that no consent had been interposed to the marriage before Joseph Robertson. But there is no conclusive evidence of knowledge before the marriage; there is of knowledge after the marriage. But the question still remains, what is the operation of such posterior knowledge and intimacy? It is nothing as affecting the consent by the appellant before the clergyman; and if not, of what consequence is the inquiry or the admission? But, in truth, the respondent did not relinquish his character of husband; that is established by the proof. Every thing shews that there was a real consent, although, for reasons best known to themselves, the parties did not choose to continue to fulfil the obligations of marriage. To allow it to be

said that Dr M'Neill's conduct shews there was no consent by the appellant, would open the door to all sorts of evidence. Besides, he was in hopeless dotage. As to the last point which I have to notice, whether the Commissaries meant by their judgment that the parties were to return to their conjugal rights, or only that they were married parties, I understand the interlocutor not to have imposed on the parties the obligation of adherence and cohabiting. There is a declaratory process in Scotland for the very purpose of enforcing adherence after the declaration of marriage has been pronounced. These two declarations are very different things. A claim for adherence may be forfeited by personal crime, but not the declarator of marriage. The point raised in the present summons was merely, Was there a marriage? To decide that question the declarator was brought. There might or might not have been other conclusions. June 20. 1828.

Earl of Lauderdale. Do you mean to contend, that, under the present summons, it would be necessary, in order to enforce the adherence of the parties, to commence a new action?

Dr Lushington. No, my Lord, I would say not. The summons is so wide that the pursuer would only have to go back to the same Commissaries, and discuss the point of adherence. As to the plea of personal exception, that is given up by the appellant, and wisely. With us, even in the most distressing case of nullity of marriage, arising out of our marriage statutes, such a plea was not listened to, and yet the Court would have been glad to have availed themselves of the means of protecting the injured woman. There have been instances of a marriage of twenty years' standing, and of which eleven children have been born, being annulled. Yet although the father came into Court to seek the aid of the statute to attest his moral guilt, the plea of personal exception did not bar him. It is the interest of the public, that the true legal status of parties be declared. Whatever, therefore, has been the respondent's conduct, he must have his declarator of marriage. But it may be said, that the plea of exception will stand against a claim for adherence; and, indeed, what is adultery, cruelty, desertion, when used as a defence, but a plea of personal exception to the claim for adherence? But there is a peculiarity in the present case. We shall suppose adultery on the part of M'Gregor; and it must, in return, be conceded to us, that there has been adultery on the part of the appellant. But the law says, that where there has been a compensatio criminis, the parties must live together. This is bottomed upon the ancient canon law, which is good authority in

June 20. 1828. a Scotch case. Where two parties commit adultery, neither is entitled to a divorce. And there is no intermediate place between adherence and divorce. If, therefore, there cannot be a divorce, there must be adherence. It has been much pressed, that the respondent cannot be justified in a Court of Justice for his behaviour in this matter. But we don't ask a favour; we only ask for what law gives him—his legal rights. And it is against all principle to investigate the moral character of the party, where he only claims the ordinary administration of the law. Any such inquiry is not merely superfluous, but is unjust. This House ought not to attempt to create a precedent for meting out, what would be contrary to all sound principle, a nice and accurately calculating equity to satisfy each individual case. You cannot apportion law to morals. If you try to do so, it will be a failure in a great majority of cases, and would sap the most valuable basis of justice—certainty in its administration.

Earl of Eldon. There is one circumstance in this case to which I wish to direct Counsel's attention. The judgment of the Commissary Court, and of the Court of Session is, that a good marriage was solemnized by the Rev. Joseph Robertson at Edinburgh; now, the respondent's summons states, that a good marriage was solemnized at Holytown. If the first marriage be good, can the second marriage be any thing more than a form of marriage? If the second be a good marriage, how is it to stand on an interlocutor, where the Judge proceeds upon a summons which declares a former valid marriage? Can both marriages be good? It is a common thing, I know, for a person who has been married in Scotland, to be married a second time in England. He may not be able to prove the Scotch marriage; and if he cannot prove the marriage in Scotland himself, nobody else can; and therefore the marriage in England will stand good. But can he prove that second marriage to be good upon a summons which declares that there was a prior valid marriage? Should he not first get a deliverance by a judgment with respect to the prior valid marriage? Can there be two valid marriages?

Keay. The statement in the summons is, that an irregular marriage was celebrated by Dr M'Neill, between the appellant and respondent, at Holytown.

Earl of Eldon. Yes; but according to your law, that irregular marriage is a good and valid marriage, although it was irregular. You have asserted in your summons, that what did pass at Holytown was not an irregular something—an irregular ceremony—

but an irregular marriage. Now, if, although irregular, it be still a valid and good marriage, how, upon this summons, can the second be a good and valid marriage? Could any subsequent ceremony between the same parties be also a marriage? You say it was to complete that marriage. June 20. 1822.

Keay. I admit certainly that the second marriage was entirely unnecessary, but it was a good marriage. It is not an uncommon practice in irregular marriages to have a second celebration.

Earl of Eldon. It may have been unnecessary; but does that make it a good marriage? To keep the pleadings right, I want to know whether the Court can declare that to be a good marriage which the party applying to the Court declares to have taken place subsequently to a prior valid marriage?

Earl of Lauderdale. Or whether the Court ought not to have found that there was no marriage at Holytown, but that there was a marriage at Edinburgh? The first marriage was said to be by Dr M'Neill, though, no doubt, there was no certificate of proclamation of banns.

Earl of Eldon. That appears to be of no consequence; for in Scotland a certificate of that kind on oath seems to have meant a certificate of twenty falsehoods.

Keay. If the pursuer had failed in an attempt to prove the first marriage at Holytown, it might have been necessary for the Commissary Court to find that such marriage had not been proved, and to declare that another marriage had been celebrated at Edinburgh. But that was not necessary in this case; for it was not requisite for the pursuer to offer any evidence of the first marriage which took place at Holytown, as the second marriage at Edinburgh was found to be valid by the Court.

Earl of Lauderdale. The first marriage at Holytown was before a clergyman, but without witnesses; and if it took place, it must be a good one.

Keay. I am not aware that Dr M'Neill was a regular clergyman entitled to celebrate marriages.

King's Advocate. It is stated in this paper that he gave the nuptial benediction.

Earl of Eldon. The summons expressly states, that there was an irregular marriage contracted; that a marriage was completed in fact, by consummation by the parties at Holytown; and in order more effectually to celebrate 'that' marriage,—that marriage, my Lords,—this second marriage was had before Joseph Robertson in Edinburgh. Well, then, we have it upon the face of the summons, that the purpose for which the second marriage

June 20. 1828. was supposed to be had, was to give effect to the first marriage; that is the intention alleged in the summons, but no proof whatever is given of the marriage at Holytown. On the contrary, this gentleman afterwards confines himself simply to proof of the marriage before Joseph Robertson at Edinburgh. Now, is that, or is it not, according to the law of Scotland, the proper way of making the probata of the allegata in your summons? Your Lordships must observe, that Mr M'Gregor brings evidence to contradict his summons; for when he produces those marriage lines, which are, I believe, evidence of a certificate of banns, the first thing certified in these lines is, that the parties are free of each other,—'free and unmarried' are, I believe, the words used. I really ask those questions for explanation. I know it is thought a hard thing to make such objections to a Scotch summons; but in a matter of this great importance, I certainly think that the summons ought to be very accurate. Your own summons expresses your wish to get married again, for the purpose of effectually celebrating that marriage at Holytown.

Keay. Then, supposing, my Lords, the summons to be loosely drawn, can that be urged as an objection by the defender in this stage of the proceeding?

Earl of Eldon. The question is, Whether a party who comes into Court with this summons, must not prove what is alleged in his own summons?

Earl of Lauderdale. And whether, by giving up the Holytown marriage, you have not, in fact, cut yourselves out of the cause?

Keay. Supposing, my Lords, that we had gone into proofs of the Holytown marriage; that evidence had been given for and against that marriage; and that the result was, that no such marriage had been proved; and that the summons contained a substantive statement of a marriage at Edinburgh, and that the evidence of such marriage was complete; would your Lordships have dismissed the action, upon the ground that the statement in the summons was, that the second marriage was calculated for the purpose of completing the former marriage?

Earl of Eldon. I cannot venture to say what this House would do, but I should, for my part, feel a strong inclination to ask, in the first instance, the Court of Session, what they would have done if such an objection as the present had been made. This summons bears likewise evidence of the intention of the woman with respect to this second marriage, for it states, that it was the intention of both parties to give effect to the former mar-

riage by celebrating this second marriage. Now, if she did not go to the house of Joseph Robertson with that intention, she did not go with that intention which you allege in your summons to be the operative cause of her going to Robertson's house. You must observe, that neither the Commissary Court, nor the Court of Session, negatives the former marriage, nor makes any deliverance upon that part of the summons; so that, if this House should be of opinion that no valid marriage, either upon the ground of irregularity, or upon any other ground, was contracted in May 1816, this gentleman would be at liberty to go again before the Commissary Court in a new action, and insist that he was married at Holytown. June 20. 1828.

Lord Chancellor. It is uncertain, from the decree of the Court of Session, or the decree of the Commissary Court, when the marriage which has been pronounced good took place. The decrees only say, that the parties are married persons, but from what period the decrees do not state; and it will be necessary to know from what period they are to be married persons, when we come to declare the status of the parties interested.

Keay. According to the practice of the Courts of Scotland, the judgment is taken with reference to the evidence laid before the Court; and in this cause is applicable to the marriage of the 23d of May. The judgment must be considered as applicable to that marriage.

Earl of Eldon. Give me leave to ask you this question, What means have we of knowing that our judgment will put an end to this cause? Suppose this House should be of opinion that the marriage of the 23d May 1816 was, for sufficient reasons, not a good marriage, would, or would not, this gentleman be at liberty, upon this or upon some new process, to go into the Commissary Court, and desire to have a declarator stating him to have been married in the spring of 1816? I suppose that your spring in Scotland is a little before May. There is no deliverance upon the first marriage,—there are two marriages alleged,—are both good? If both are bad, we know that two bad marriages cannot make one good marriage; but ought there not to have been some deliverance upon the allegation of the first marriage? and ought there not to have been some attention paid to this circumstance, —that the pursuer states in his summons, that the leading and primary intention of the parties in going before Joseph Robertson was to make a good marriage of 'that marriage,' which he alleges to have been validly, though irregularly, contracted at Holytown?

June 20. 1828.

Keay. To the first question put by your Lordship, whether, from the judgment of the Commissary Court, it can be known what marriage has been confirmed? I say, that the judgment of the Commissary Court is full and explicit.—They 'find, that 'the pursuer has established by sufficient evidence that a mar-'riage was celebrated betwixt the defender and him, by the 'Reverend Joseph Robertson, late minister of the chapel in 'Leith-wynd, Edinburgh, in the month of May 1816;' and, upon that finding, the parties were pronounced married persons; and upon a review the Commissaries find, 'that no circum-'stances have been attempted to be proved on the part of the 'defendant from which to infer intimidation, as averred by her.' This second interlocutor clearly applies to the marriage at Joseph Robertson's, which the defender avers to have been effected by intimidation.

Earl of Eldon. Then give me leave to ask you this question. According to your notion of the law of Scotland, would that which was found to have taken place at Joseph Robertson's be a marriage, if it were true, as stated in your summons, that a valid though irregular marriage had been contracted between those parties previous to that day, the 23d of May 1816?

King's Advocate. Their summons is not founded upon the marriage at Joseph Robertson's, for they state that that marriage was to confirm the other irregular marriage at Holytown.

Earl of Eldon. We have a great deal of allegation about the marriage at Holytown, and of what preceded it; but we have no proof to support those allegations; and we have most important evidence of what followed after that marriage. The intention of the marriage at Joseph Robertson's is expressed, (foolishly, I think,—I beg pardon for using that word; but, in my opinion, it is foolishly expressed in the summons), to be to give effect to the first marriage, 'that marriage' celebrated at Holytown. Now, if the first was a bad marriage, the second may be good; but I have never yet heard how the second can be considered a good marriage, if the first were a good marriage; and yet the first marriage is alleged to be a good marriage; and it is now said, that the judgment finds the second marriage to be good. So that, taking the allegation in the summons, and the judgment of the Court of Session, we have two good marriages contracted between the same parties.

Keay. It is true that the summons sets forth both marriages; but the judgment only finds the second marriage to be valid. I apprehend, that the finding of the Court disposes of the first marriage.

Earl of Eldon. That apprehension comes late, Mr Keay; for you take credit for giving up the proof of the first marriage as not necessary. June 20. 1828.

Keay. If a pursuer makes an averment, and then declines to prove it, he necessarily must submit to have this averment negatived, and the Commissaries necessarily negatived it in finding the second marriage proved. Then the question arises, if the parties had loosely contracted marriage, having no witnesses, and afterwards, with a view to complete the marriage, had another marriage, would that marriage be of force and avail? It would; and it was the duty of the appellant, if she saw reason to object to the shape of the summons, to have said, dispose of the first alleged marriage, before you proceed to the second.

King's Advocate. But the second was not a marriage at all. It was an order or ceremony to complete or publish the first marriage. No consent was then interposed; for, ex concessis of the summons, the parties were already man and wife, and in that character had consummated. The respondent, having so libelled his case, cannot abandon the proof of the first marriage, and betake himself to a second; at all events, we are let into facts and circumstances to shew, that at Joseph Robertson's there was not a consent ad ipsum matrimonium.

Earl of Lauderdale. Was Dr M'Neill a clergyman?

The King's Advocate. I understand he was a clergyman. I find it stated in the papers that he gave the nuptial benediction.

Lord Chancellor. He does not appear to have been a clergyman from any thing in the papers, I think.

Earl of Eldon. The respondent, in his summons, avers consummation after the Holytown marriage, which he does not in the other marriage.

The King's Advocate. Just so, my Lord.

Earl of Eldon. I should wish to ask a question, which Mr Keay or Mr Miller can perhaps answer. The summons avers, that it was to carry into execution that marriage alleged to have been contracted at Holytown, that the ceremony, or whatever you call it, took place at Edinburgh. Either this gentleman, Mr M'Gregor, had sufficient proof of a marriage at Holytown, or he had not. If he had sufficient proof of the marriage at Holytown, he could have made good the averment of his summons; but if he had not sufficient proof of the marriage at Holytown, (which may be the case, and we know very often happens in matters of this sort), I want to know whether, according to the practice of the Commissary Court of Scotland,

June 20. 1828. and the Court of Session, he might not have applied to amend his summons; that is, to have struck out the averment of the marriage at Holytown, and to have altered his summons so far as to have averred a marriage at Edinburgh?

Miller. There is no doubt that, according to the law and practice of Scotland, (not in every case, but generally speaking), there is a power in the pursuer of an action, at a certain stage of the proceedings, to amend his summons; but though that is generally allowed, it is not allowed in all cases. I am not prepared to say, that if the pursuer had applied for permission to amend his summons, he might not have been defeated by shewing that there was a distinct averment in point of fact, and that the proposed amendment would negative that averment, and do away completely any idea of a second substantive marriage. I cannot say how that question would be disposed of after argument, nor am I aware that a precisely similar case has occurred; but the general rule is, that before parties join issue, and go to proof, the pursuer may apply for leave, and he generally does on such application obtain leave, to amend his summons, to vary any fact, or supply any thing in respect of which he, on further inquiry and consideration, conceived he can bring forward proof.

Earl of Lauderdale. There is no doubt he might have abandoned his summons and proceeded afresh.

King's Advocate. There is no doubt, I apprehend, that that might have been done.

Dr Lushington. The respondent avers two marriages; afterwards he finds that he cannot prove the first; but would you require him to abandon the second, when, if the first is bad, the second must stand good?

Earl of Eldon. Still there is this great difficulty:—It has happened to me, whilst I had the honour of holding the Great Seal, to know that a great many of my female wards have thought proper to be married in Scotland rather than England; and it has also been a right mode of proceeding in that Court, to take care that the parties so married, should be married over again in England on account of the difficulty of proof. There are two ways in which that second marriage may take place—the one by license, the other by banns: and I have had reason to learn, that at Doctors Commons your license is very special, and a well considered one; but I have also had reason to know, that persons in the country, who are authorized to issue licenses, do not conform to your proper and well considered form. Now I take it, there can be no manner of doubt, and

that it would be the most dangerous thing in the world to breathe any thing like doubt, upon the validity of one or other of those marriages. If, therefore, a person has occasion to sue in our Courts, he avers generally that he is married. He does so in our Courts—I do not know how it is in your Courts, nor do I presume to say a word about that. He may set about proving the marriage in England, if he thinks proper; or, if he can prove the marriage which took place in Scotland, he may prove both; and as the marriage in Scotland is a good marriage, the question then is, whether his proof of the second marriage really establishes any fact whatever, except that he went through the ceremony. But in whatever way the cause is disposed of in our Courts, the one or the other marriage is certainly good: and the question then would be, whether, if there was a declaration stating that he had been married in Scotland, and then a declaration stating that, after he had been duly married in Scotland, he, for the purpose of making that marriage good, (for that is the averment in this case), was again married in England, whether, on a declaration so peculiarly framed, the proof of the first marriage in Scotland would not negative the assertion of the second marriage in England? It is a question of form upon the summons, and nothing else: It is not a question of substance. I have taken this opportunity of mentioning it, because I am sure it would be a most desirable thing that all persons in the country, authorized to grant licenses, should be furnished with your excellent form, and should proceed according to the Doctors Commons. June 20. 1828.

Dr Lushington. If the late Lord Mansfield had been aware of our form of license, when he advised the late Earl of Berkeley as to the form of license for his second marriage, it is not impossible that that case might have taken a different turn.

Earl of Eldon. The only question here would be, if there was an opportunity of amending your summons, or of abandoning your summons before issue joined, whether, as you have not amended your summons, and have not abandoned your summons, and raised a new summons before issue joined, there is or not proof of that first marriage at Holytown? Is it enough for us, in a case of this grave importance, that you should merely take upon yourself to say that you could make no proof of that, while you continue in your summons to aver that you could?

King's Advocate. Dr M'Neill is dead; so there is no living witness of the alleged first marriage; and yet the respondent continues to repeat the statement: He even continues to aver

June 20. 1828. consummation after the Holytown marriage, a thing the Doctor could not have proved.

Earl of Eldon. That is a sort of thing they could have proved, I should have thought; or at least given tolerable proof of it, though Dr M'Neill was in his grave. They prove that there were two beds in the room, and, I think, some sheets or curtain, or something of that kind, put up; a sort of thing which, I suppose, might have been removed.

Lord Chancellor. That would not have been an insurmountable impediment in such a case, I apprehend.

King's Advocate. When parties return from a Scotch marriage, and are here married again, that is done to remove doubts, but not to complete the Scotch marriage; and the second could be proved, should evidence of the first be deficient. In our case, the status of parties was, according to the respondent's statement, determined before they went before Joseph Robertson. There was no consent to marriage before him, but a consent to heal the irregularity of the alleged marriage at Holytown. The witnesses at Joseph Robertson's did not know what had passed at Holytown. So while they speak to an apparent consent to marry, they truly are only speaking to the completion of the first marriage. The evidence is quite defective as to the marriage lines.

Lord Chancellor. Where is the certificate of the proclamation of banns? Has it been proved that this certificate was given in legal form?

Dr Lushington. The certificates of the proclamation of the banns is proved to have been given by two witnesses, and it was exhibited to Joseph Robertson at the time of the marriage.

Lord Chancellor. Do you mean precisely in the form which is stated in the appendix to the additional proof?

Dr Lushington. I do.

Earl of Lauderdale. If I recollect the evidence, they do not prove that a certificate of proclamation of banns was given. All they state is, that upon the sight of the entry in the books, and the knowledge of their practice, there must have been one.

Dr Lushington. Yes, exactly so.

King's Advocate. There are great doubts if ever it was given at all, and still more that it was produced to Joseph Robertson at the time of the marriage. There is the evidence of Mrs Robertson, that she either saw or heard of one; but all which Miss Robertson says is, that her father said there were marriage lines.

Lord Chancellor. Have you turned to the evidence of Mason?

Dr Lushington. Mason distinctly swears he is quite certain that he gave out the certificate of proclamation of banns in the usual form to these parties. It is impossible to have a stronger or a more conclusive proof. The proclamation of banns in this country could never be proved by better evidence; for no man's memory serves him as to a particular act. June 20. 1828.

Earl of Lauderdale. It is an impression from his usual practice.

Lord Chancellor. He does not remember it, but he is sure of it, because it corresponds with his usual practice.

Dr Lushington. Just so, my Lord.

King's Advocate. The respondent cannot better his case by the appellant's admissions, for he must take them with their qualifications; and she alleges force and fear, and influence which the consideration had that he was possessed of her father's deeds. He admits these deeds were placed in his hands by Dr M'Neill after the marriage.

Earl of Lauderdale. That is a very important passage. It proves that the respondent was in possession of the deeds before the ceremony at Joseph Robertson's; for the words are, 'They were placed in his possession by Dr M'Neill after the 'marriage had taken place.' Now, Dr M'Neill knew only of the marriage at Holytown, because it is in evidence that the other marriage was concealed from him.

Earl of Eldon. My Lords, From the view I take of this case, I believe I shall have the concurrence of all the noble Lords now in the House, in the motion I am about to make,—viz. That the House shall proceed to judgment in this case, after the recess. I will take this opportunity of disposing of one point, which was raised by myself, namely, with respect to the proceeding so far as it has two objects in the prayer of the summons: the one is, that of declarator of marriage; the other is what we should call a restitution of conjugal rights, which they call a decree for adherence. I was misled by the circumstance of my not having read the petition of appeal in this case; but the petition of appeal was regularly founded on the Act of Parliament, which now lies before me; and which Act of Parliament authorizes an appeal to this House, after an interlocutor is pronounced which may have a material effect upon the ulterior proceedings in the Court below; if that interlocutor is appealed from, either with leave of the Division, or there is certified to have been a difference of opinion among the Judges. Therefore, the interlocutor having in the first instance disposed of no-

June 20. 1828. thing more than the fact of a marriage, an appeal was interposed; and upon that appeal we can do nothing that is positive and final, except by a declaration upon the question, marriage or no marriage, regard being had to the summons, the condescendence, and the other proceedings in the case. I apprehend, however, on looking into the Act of Parliament, (and I wish to mention it now, that if there is any objection to stating it, on generally applying myself to the gentlemen who come from Scotland with respect to this cause, I may be set right), there is nothing in this Act of Parliament which will prevent this House, if it thought proper, sending back this judgment which has been pronounced, from which there is now an appeal, requiring the Court to give its judgment also upon the other prayer of the summons; namely, whether there should or should not be, in such a case as this, a restitution of conjugal rights. At the same time, as it is of infinite importance not merely to these parties, but it may be so to many other persons, (and there are a great many questions of considerable importance and difficulty that have been raised at the Bar), nobody can doubt that if the case can be disposed of upon the merits now, it should be so disposed of. With reference to the importance of the cases and questions to which I have alluded, and the importance of delivering these parties, if we can properly and justly do so, by our first determination, it has appeared to the noble Lords who have heard this case, as well as myself, that it is due to such a case as this that we should deliberate upon it before we decide. We should not, however, deliberate too long upon it, and therefore I should now propose to your Lordships that the House should proceed to judgment upon this case on the second day of hearing appeals after the Easter holidays.

This having been agreed to, the House of Lords thereafter pronounced this judgment:—

'Upon due consideration of all the proceedings in this action 'of declarator of marriage at the instance of Malcolm M'Gregor 'against Mary Black M'Neill, particularly of the summons, 'dated 25th March 1818, wherein the allegations set forth are, '—"That an irregular marriage was celebrated between the 'said Malcolm M'Gregor and the said Mary Black M'Neill, by 'Dr M'Neill, at Holytown, in spring 1816, which was consum-'mated by their spending several nights together in the same 'bed;" and "that they considered it proper, on their return to 'Edinburgh, in the month of May 1816, that no time should be 'lost in celebrating in facie ecclesiæ that marriage which had

'been irregularly celebrated between them; and accordingly 'they were, in the month of May 1816, regularly married by 'the Rev. Joseph Robertson, minister of the chapel in Leith-'wynd, Edinburgh;" and upon examination of what has been 'established by evidence in the Courts below, with reference to 'the facts alleged in the said summons—this House is of opinion, 'that there is no proof whatever of any marriage between these 'parties having, at any time, taken place at Holytown, or of 'any regular marriage in facie ecclesiæ having been celebrated 'between them at Edinburgh, in the month of May 1816. 'And farther, this House, taking into consideration all the facts 'and circumstances proved in relation to the conduct of the 'parties, both before and after the 23d of May 1816, is of opi-'nion that there is not evidence sufficient to justify the conclu-'sion, that the said Mary Black M'Neill, and the said Malcolm 'M'Gregor, did, on the 23d of May 1816, or at any other time, 'voluntarily and deliberately express that real mutual consent 'immediately to contract marriage, which, by the law of Scot-'land, is necessary to give validity to such an irregular marriage 'as is alleged to have taken place: It is therefore ordered and 'adjudged, by the Lords Spiritual and Temporal in Parliament 'assembled, That the said several interlocutors complained of in 'the said appeal be, and the same are hereby reversed; and that 'the farther proceeding in this action be, and the same is here-'by remitted to the Court of Session, with instructions to give 'directions to the Commissary Court to dismiss the declarator 'of marriage raised at the instance of the said Malcolm 'M'Gregor, by summons of date 25th March 1818, and to as-'soilzie the defender, the said Mary Black M'Neill, from all the 'conclusions thereof: And this House having so ordered and 'adjudged, doth not think it necessary to determine upon what 'has been submitted to its consideration, viz. Whether the 'several interlocutors herein before-mentioned could have been 'deemed duly pronounced, in proceedings to which Robert 'Jolly, and the children of the defender, Mary Black M'Neill, 'were not parties?'

June 20. 1822.

EARL OF LAUDERDALE.*—My Lords, This is an action of declarator of marriage brought by Malcolm M'Gregor, a man of very low birth, and of distinguished immorality of character, against Mary Black M'Neill, the natural daughter of the Rev. Dr M'Neill, a clergyman, in respect of immorality of conduct certainly worthy of sustaining the

* Revised by his Lordship.

June 20. 1828. relation of father-in-law to the pursuer, who by this declarator aims at the honour of becoming his son-in-law.

My Lords,—This action was commenced by a summons, on which I shall have a good deal to observe, raised on the 25th of March 1818; and after the usual defence and reply, a proof was allowed and taken, which having come to be advised by the Commissary Court, we find that the first interlocutor of the Commissaries, given on the 1st of June 1821, was to the following effect:—'The Commissaries having 'considered the memorials for the parties, proof adduced on both 'sides, and whole cause, find, that the pursuer had established by suffi- 'cient evidence that a marriage was celebrated betwixt the defender 'and him by the Rev. Joseph Robertson, late minister of the chapel 'in Leith-wynd, Edinburgh, in the month of May 1816; and find, that 'the defender has failed to establish by evidence any circumstances 'sufficient to elide the legal presumption thence arising, of the matri- 'monial consent having been duly adhibited by her on that occasion; 'find, therefore, facts, circumstances, and qualifications proven, rele- 'vant to infer marriage between the parties; find and declare them 'married persons accordingly, and decern.'

Now, on this interlocutor, I only wish to call your Lordships' attention at present to the circumstance, that the finding here is completely different from the allegation in the condescendence and summons; for they allege, that a regular marriage was celebrated at Edinburgh, to give form and effect to the private marriage which was alleged to have taken place at Holytown.

My Lords,—Subsequently the appellant presented a short petition against this interlocutor of the Commissaries, and on the 7th of December 1821 the Commissaries pronounced this interlocutor:— 'Having considered this petition, and answers thereto, and resumed 'consideration of the whole process, find, that no circumstances have 'been attempted to be proved on the part of the defender from which 'to infer intimidation as averred by her: find, that the inference of the 'defender's matrimonial consent, arising from the marriage ceremony 'at Robertson's, is strengthened by the defender's admission that the 'pursuer accompanied her back from Robertson's to her father's house 'on the same evening, and that a presumption thence arises of sexual 'intercourse having followed betwixt the parties, which is farther con- 'firmed by what passed at White's, the lapidary, some time thereafter: 'find, that the inference of the defender's matrimonial consent is not 'contradicted by any part of the pursuer's conduct immediately follow- 'ing the marriage ceremony; and that although his conduct at a subsec- 'quent period may import his willingness to relinquish his legal claims 'to the defender as his wife, such conduct cannot destroy the legal 'effect of the evidence adduced to establish the validity of the previous 'union of the parties; therefore, with these explanations, refuse the 'desire of the petition, and adhere to the interlocutor reclaimed 'against.'

This cause was then brought into the Court of Session by advocation, and the Court, after hearing parties upon mutual memorials, remitted it to the Commissaries, with instructions to take further evidence. Your Lordships have had in your hands the whole evidence, and at the Bar they have commented at large upon the proof, as well as the additional proofs that were taken upon that occasion; but notwithstanding those additional proofs, the Commissaries adhered to their former interlocutor; and the cause having been again brought before the Court of Session, the interlocutor was affirmed by that Court; and it is against all those interlocutors that this appeal is brought by Mary Black M'Neill, the appellant. June 20. 1828.

Now, before calling your attention to the particular grounds upon which I shall humbly offer to your Lordships my reasons for thinking that those interlocutors ought not to be affirmed, I wish to call your Lordships' attention shortly to the outline of this case.

My Lords,—It appears that this Mr M'Gregor was married to the step-daughter of a woman of the name of Christian Robertson, to whom Miss Mary Black M'Neill was given in charge to be nursed from that time, though she returned again to her mother's house, with whom she lived to the age of twenty-three. Miss Mary Black M'Neill seems to have frequented principally the society of Mrs Christian Robertson —her step-daughter, the wife of Mr M'Gregor—of another daughter, Margaret Robertson—a type-founder of the name of M'Naughton, and his wife, another daughter of Christian Robertson—and lastly, of a cousin named Janet Nicholson, by whom it appears that M'Gregor, after the death of his first wife, the daughter of Christian Robertson, had two natural children, if indeed there is not evidence in the case that he was married to her; because your Lordships will find, that, in the course of the examination of this Janet Nicholson, though she asserts broadly that she never had confessed it either to Mr Jolly or to Mary Black M'Neill, and though she is asked by the examiner whether she ever confessed it to any body else, the examiner has carefully abstained from putting the question direct, whether she actually was married.

My Lords,—In such society your Lordships cannot suppose that this unfortunate woman got any very distinguished education, or that she could contract habits other than those which were calculated to debase her mind; but, in the mean time, it appears that this man, Mr M'Gregor, who must be considered to have been a man of considerable art and cunning, though of low birth and station, had got such an influence over the mind of Dr M'Neill, that, in the end of the year 1815, when the mother of Miss Mary Black M'Neill died, we find him boasting that he had used his influence to get Mary Black M'Neill acknowledged by her father, and taken into his house. What his object was in so doing I think I shall convince you; for I think I will make it impossible for your Lordships to doubt, that he, at this early period, laid the project, through the influence he had gained over the

June 20, 1828. mind of Dr M'Neill, of getting to himself Dr M'Neill's property, through the medium of getting the hand of this natural daughter.

In pursuance of this design your Lordships will find, that, by Dr M'Neill's direction, some time about the middle of April 1816, he managed to get a deed executed, which gave to Mary Black M'Neill the house which Dr M'Neill inhabited, and L.500 of money; and, on the 1st of May following, Mr M'Gregor got him to execute a deed, which conveyed to Mary Black M'Neill, by disposition mortis causa, his whole landed property lying in Lanarkshire, in the neighbourhood of Holytown.

My Lords,—It was not long before Mr M'Gregor took steps to follow out the design which he had thus early formed; for, in the middle of May, it appears that he went with Dr M'Neill and his daughter, for the purpose of giving his advice concerning the management of the property near Holytown, and it is alleged, that there the irregular marriage stated in the summons took place. How it was irregular, when compared with the marriage subsequently contracted at Edinburgh, it is very difficult to discover; because in neither was there a proclamation of banns, and that marriage was celebrated before a clergyman of the church of Scotland as well as the other, and I believe the most immoral clergyman, with the exception of Mr Joseph Robertson, that possibly could have been picked out from the members of that church.

My Lords,—Mr M'Gregor states to your Lordships, that he returned to Edinburgh with the family on the 20th of May 1816; and that the parties there formed the design of celebrating regularly the marriage which had been irregularly contracted at Holytown. Now, my Lords, whether the parties were, or were not, conscious that upon this occasion they had contracted marriage, I shall, in stating the facts of this case to your Lordships, submit to you my opinion subsequently; but in the mean time it is sufficient to say, that there is not, in the whole mass of evidence, any proof whatever, that from the moment that that alleged marriage was contracted, either of the parties acted as if they had actually thought they had been married persons. I know very well that the Commissaries have stated, that immediately after the marriage nothing was done such as was sufficient to contradict the inference of consent on the part of Miss M'Neill. They find, 'That the inference of the defender's matrimonial consent, arising 'from the marriage ceremony at Robertson's, is strengthened by the 'defender's admission that the pursuer accompanied her back from 'Robertson's to her father's house on the same evening, and that a pre-'sumption thence arises of sexual intercourse having followed betwixt 'the parties, which is farther confirmed by what passed at White's the 'lapidary some time thereafter: find, that the inference of the defen-'der's matrimonial consent is not contradicted by any part of the 'pursuer's conduct immediately following the marriage ceremony.' Now, my Lords, in point of fact, I think there is direct evidence that,

immediately following the marriage ceremony, there was such contradictory conduct; because there is an admission in the action of sequestration by this very Mr M'Gregor, that he saw Mr Jolly and Mrs Jolly together within a few days of the marriage. Within a few days of what marriage? The marriage that he charges is the marriage that he says took place at Holytown; and if you are to take it to have been within a few days of that, it becomes a doubt with me, whether it was before or after the alleged celebration of this marriage at Edinburgh that this meeting took place in Pilrig-street, when Mr M'Gregor puts it beyond all controversy that he never behaved subsequently as if he had been a married man, because he states, that from that hour he abandoned her, and formed an idea that he would get a divorce. Thus it is clear, by his own confession, that even at that early period he did not conduct himself in such a manner as to shew that he was conscious in his own mind that he was married. My Lords, on the other hand it is certain, that the lady, from the very first, conducted herself in a manner that shewed that she had not the most distant idea that she was married, as sufficiently appears from her having married within a very few days another man, with the consent of her father. June 20. 1828.

My Lords,—If you look at the general outline of this case you will see, that Mr M'Gregor, having placed himself, as he thought, in such a situation that he might assert his right if it turned out that this woman really possessed her father's fortune, and that he might abandon her if it turned out otherwise, (for that seems to have been his object), abstained from doing any thing to assert his right till he saw her married to another man—till he saw children born of that marriage; and he then comes forward, thinking that she was secured in the possession of the property, and overlooking the scandalous nature of the attempt to deprive an innocent man of his wife; overlooking also the scandalous nature of the attempt to transfer to himself as his legitimate children the children of another, or, perhaps, rather to prepare for some future proceedings to illegitimatize those very children, and deprive them of their birth-right: I think your Lordships will perceive, that a more scandalous case never was brought before any Court of Justice.

Your Lordships must recollect that last year there was a case discussed at your Lordships' Bar, I mean that of a Miss Turner and Mr Wakefield. Compare the circumstances of that case with this case. It is very true that Mr Wakefield seemed to have formed a scandalous plan to possess himself of that young lady's property, though he did not know her; but is the disgrace even of that attempt any thing like M'Gregor's plan, which had for its object to place himself in such a situation, that he might, if he found it convenient at a subsequent period, claim this woman as his wife, to the effect of annihilating the status of the children she bore by another husband, and deprive this

June 20. 1828. man of his wife, who it does not appear had the smallest idea that she really was married to him?

My Lords,—If on that occasion your Lordships thought it necessary to interpose in your legislative capacity, I am sure that, acting consistently, it is impossible, before your Lordships could affirm this judgment, that you should not pause,—and that in your legislative capacity you should not send down a bill to the other House of Parliament to dissolve this marriage, and by that means do away the chance of this immoral man getting the fruits of the fraud that he has attempted to commit. Fortunately, however, my Lords, I think I can state to your Lordships grounds which will shew you that there is no occasion to resort to this extraordinary means of correcting the evil, because I think it is impossible, when the case is explained, not to see that you cannot affirm the decisions of the Court below.

My Lords,—No man possesses a greater admiration of the great powers, and of the great professional talents of many of the Judges who have concurred in this decision; but, when a member of the House has a duty to perform, it is his own judgment that he must consult; and all I can say is, that if I am wrong, I have the good fortune to have here my noble friend who is sitting on the woolsack, and a noble Lord who is now sitting near him, who, I am confident, will check and correct (for they have given minute attention to this case) any error in fact or argument which I may commit.

My Lords,—That you may follow me the more easily throughout the reasoning I am about to submit to you, I will state to your Lordships the order in which it is my intention to proceed.

In the first place, I mean to submit to your Lordships, that under the summons, as it is drawn, it would be impossible for your Lordships to affirm the interlocutors now appealed against. In the second place, I mean to submit to your Lordships, that if the summons had been otherwise drawn, and if, instead of charging an irregular marriage at Holytown, of which there is not an atom of proof—if, instead of charging an intention at Edinburgh of celebrating a regular marriage to give effect to that irregular marriage at Holytown, it had been otherwise worded, and there had been charged in the summons an irregular marriage at Edinburgh,—that there is not any evidence that has been produced upon this occasion, I mean any legal evidence, such as can carry conviction to a judicial mind, that there was any marriage ceremony at all took place upon that occasion. Thirdly, my Lords, I mean to submit, that, supposing the summons had been otherwise formed, so as to charge an irregular marriage; and supposing there had been evidence, such as was sufficient to convince your Lordships that a ceremony had taken place in Edinburgh; still the species of ceremony proved does not exhibit to your Lordships that free, deliberate, real consent to form the connexion of marriage, which the law of Scotland requires to give validity to an irregular marriage. Lastly, my Lords, I shall very shortly bring under your consideration

the cases that have already been decided in the Courts below and in this House, with a view to shew your Lordships that you must abandon every principle upon which you have heretofore acted, if you can possibly think of affirming the interlocutors in this case. June 20. 1828.

Now, my Lords, it will be my endeavour, certainly, to dwell upon details as shortly as possible. I know that your Lordships are well informed of the facts. I have witnessed the attention you have given, and it will be my object rather to allude to, than to enlarge upon, the different circumstances of the case. My Lords, the summons, on which I must first comment, is in the following words:—'That an intimate 'acquaintance having for some time subsisted betwixt the pursuer and 'Mary M'Neill, sometimes called Mary Black M'Neill, the reputed 'natural daughter of the late Dr James M'Neill of Stevenston, by 'Euphemia Black, sometime residing in Carnegie-street, Edinburgh; 'they formed an attachment, and agreed to become husband and wife 'of each other; and accordingly, when they were together at Holy-'town, in the county of Lanark, in Spring 1818, on a jaunt, in com-'pany with the said Dr James M'Neill, an irregular marriage between 'them was celebrated by the said Dr James M'Neill; and the mar-'riage was consummated by their spending several nights together in 'the same bed at Holytown aforesaid: That on the pursuer and the 'said Mary M'Neill, or Mary Black M'Neill, returning to Edinburgh 'from said jaunt, which they did in the month of May 1816, they con-'sidered it proper that no time should be lost in celebrating in facie 'ecclesiæ that marriage which had been irregularly contracted be-'tween them at Holytown aforesaid; and accordingly they were, in 'the month of May 1816, regularly married by the Rev. Joseph 'Robertson, minister of the chapel in Leith-wynd, Edinburgh. Not-'withstanding of all which, the said Mary M'Neill, or Mary Black 'M'Neill, casting off the fear of God, and forgetting her natural and 'Christian duty, and promise made at her entering into said marriage 'with the pursuer, now refuses to acknowledge her marriage, or to 'cohabit with him as her husband. Therefore the pursuer, Malcolm 'M'Gregor, ought to have our sentence and decreet, finding and de-'claring, That he and the said Mary M'Neill, sometimes called Mary 'Black M'Neill, defender, are lawfully married persons, husband and 'wife of each other, and decerning and ordaining the said defender to 'adhere to and cohabit with the pursuer, and treat and entertain him 'in all respects as her husband.'

I will not at present detain your Lordships upon the conclusion of this summons. Your Lordships will recollect, that when the Counsel were arguing this case at your Bar, I put to them, whether they could state any case of this sort, any declarator of marriage brought in Scotland, where there was proof of a second marriage, that had a conclusion desiring it to be ordained that the parties should adhere and cohabit. There is no such case existing. It is very true, that Dr. Lushington alleged at first the case of Mrs Dalrymple; but that is not

June 20. 1828. a case of a declarator of marriage. It was a case of an action for restitution of conjugal rights in this country, under rules of law perfectly different from those applicable to the present action. It is obvious what was the design of this man in so framing his summons; because, if he had concluded for a divorce, her property being mostly heritable property in Scotland, on which she was infeft, he might have lost his right to that which it was his sole object to acquire. But, waiving that consideration, I beg your Lordships to attend to this, that the interlocutor which I have already stated to you finds, not that there was a regular marriage, but that a marriage was celebrated between the defender and him by the Rev. Joseph Robertson. Is such a thing mentioned in the summons? It alleges, that an irregular marriage was entered into at Holytown. There is no finding that such a marriage was proved. In fact, there was not an attempt to prove it; and the finding is not of an irregular marriage at Holytown, as alleged in the summons, but of an irregular marriage at Edinburgh;—a judgment which, under the words of that summons, I hold it was impossible for the Court regularly to pronounce; and it is impossible for your Lordships to affirm it; for before your Lordships can, under this summons, find these parties married, you must find, in the first place, evidence to convince you that there was an irregular marriage at Holytown, of which there is not an atom of proof; and then you must have evidence that that marriage derived further efficacy and further validity from the celebration of a regular marriage at Edinburgh, of which there is not, as I shall shew to you, any thing like a proof.

My Lords,—Having stated thus much upon the subject of this summons, on which I certainly could greatly enlarge, (for a more extraordinary summons than that which has been exhibited to your Lordships in this case, and one more irregularly framed for the purpose for which it is intended, never was drawn), I will now proceed upon the supposition that this summons had been regularly formed, and assume that this summons had charged a marriage ceremony before Mr Joseph Robertson of Edinburgh. Now let me ask your Lordships, what evidence there is upon this occasion that can justify you in judicially finding that any ceremony whatever took place? My Lords, the evidence upon this subject is, like the evidence in all cases where there is a consciousness of deficiency of proof, very various in its nature. The attempt seems to be to patch up with one species of proof the deficiencies which they are conscious of in another sort of evidence: for you have an attempt to establish it by documentary proof; you have an attempt to rest on the evidence of witnesses; and lastly, you have an attempt to establish it by insisting upon the admission of the party.

Now, my Lords, with regard to the documentary evidence, I must submit to your Lordships, that there never were documents more deficient tendered to a Court with a view to produce a conviction upon any subject. In the first place, you have produced to you a paper

entituled a Registrate of Marriage, and this paper is produced to you with a view to convince your Lordships' mind, aided and assisted by the evidence of Mr Bow and Mr ; witnesses who were afterwards produced to prove that there actually was that which it is impossible could have existed, and which there is no proof ever did exist, a certificate of proclamation of banns granted upon this occasion. It is indeed confessed not to have existed by the witnesses brought forward. But it is more material to shew your Lordships that it could not exist. Your Lordships will recollect that those parties returned from Holytown on Monday the 20th of May, and at that time it is asserted they first formed the design of celebrating this regular marriage in facie ecclesiæ. On Thursday the 23d they were said to be married. Now, though there could be no intervening Sunday between the Monday and the Thursday, your Lordships are desired to believe, upon the strength of those documents, that a proclamation of banns actually took place, the parties telling you a story which makes it perfectly impossible. June 20. 1828.

My Lords,—This registrate of marriage is in the following words: 'Registrate of Marriage.—Edinburgh, 21st day of May 1816.—'Malcolm M'Gregor, printer, Old Church parish, and Mary M'Neill, 'St Cuthbert's parish, daughter of Dr James M'Neill, Edinburgh.—'Edinburgh, 3d December 1817. Extracted from the Register of 'Marriages for the city of Edinburgh.' Now, it is very material that you should attend to the date of this registrate of marriage, which is the 21st of May; the date of the register of marriage is the 22d; so that you have two documents to prove a fact that is admitted not to be true, and which it is shewn cannot be true, these two documents having dates that would destroy their effect, even were they resorted to to prove a fact not otherwise impeached.

My Lords,—The next documentary evidence is on a par, at least, with that which I have already described; for you have produced to you a book of private memorandums of Mr Joseph Robertson, a man before whom it was proved, in a case in the Court of Session in the year 1814, (Dow v. Adie), that a private marriage was celebrated, one of the parties being represented by a person hired for the purpose.

My Lords,—This is a book formed by this man, who at that time was in prison for having celebrated an irregular marriage, contrary to the Act of Charles the II., and for the forging of marriage lines: and you are desired to give credit to this book, there being upon the face of it obvious marks that a great many of the entries must have been made at one and the same time, in one hand; and after all, it being only an irregular private memorandum of this man, who was convicted of bad practices with respect to certificates. But, my Lords, you have another document, which, if this had been a regular register kept by Mr Joseph Robertson, and a man of unimpeachable character, would have defeated the force of this entry; because you have a certificate in the handwriting of this very same man, of the date

June 20. 1828. of the 29th of May, purporting to be a certificate that those parties were married by Mr Joseph Robertson on the 29th. Then, what am I to believe, if I believe any thing that is to be inferred from these documents? Did this marriage take place on the 29th, or did it take place upon the 23d? It is impossible for your Lordships to discover upon which day it did take place; for though it has been attempted to decide this by the evidence of witnesses, your Lordships will see that they do not recollect the date of the marriage. I hold, therefore, that it is impossible for your Lordships to allow your minds to be in the smallest degree influenced by a registrate of marriage, which is contradicted by the register of marriage; or by a book kept in the irregular manner that I have described, which is contradicted by the certificate of the person that keeps it.

My Lords,—The parties seem to have been conscious that this documentary evidence was not worth much, and consequently they have relied upon the viva voce testimony of Mrs Robertson the wife of this man, and of Miss Robertson his daughter; and it does so happen (which is worthy of remark, because it places those witnesses in a very suspicious situation), that the very day on which they were examined was the day on which this man was liberated from prison, and on which his further punishment of banishment commenced; they were therefore persons who had an obvious interest to explain away his conduct, and to make it appear as regular as possible, looking undoubtedly for some mitigation of the remainder of the punishment which the Court had inflicted upon him.

Now, my Lords, Mrs Robertson, his wife, (and it is not alleged that there was any other person present but his wife and his daughter), is the first person examined, and to the first question,—Mary Black M'Neill being pointed out to her,—Whether she knew this woman? she distinctly says, that she does not know her, and that she does not recollect ever having seen her before. I am sure your Lordships will agree with me, that the moment that answer was given, the witness should have been sent out of Court, as it was quite obvious that no benefit could be derived from her testimony. But, my Lords, that was not the mode that was pursued. Mrs Robertson's recollection was refreshed, by producing the book to which I have alluded, and reading to her the entry of the marriage, in order that she might in some degree gain some recollection of the facts of the case; a proceeding which, I say, ought not to have taken place; for this book, not being itself evidence, never could have been regularly brought forward to prompt the recollection and memory of a witness, who they knew must be willing, from her situation, to say any thing upon that occasion. She is then asked, if she knew Mr M'Gregor?—He is pointed out to her, —and her answer is, that she knows him perfectly, but she never saw him either before or after the time on which, according to the entry, the marriage was celebrated. This seemed very extraordinary when she professed to have a perfect knowledge of his person; it therefore

naturally suggested this question,—how did she recollect a man that she had never seen before or since? to which her answer is,—Indeed I know very little about it. Now this is one of those witnesses who are brought forward to identify the parties; and I wish to know whether it is possible for your Lordships to say, that Mrs Robertson's evidence can be held in the smallest degree to contribute to your conviction, that Mary Black M'Neill and Mr M'Gregor were present on the day on which this ceremony is stated to have taken place at Mr Robertson's? June 20. 1828.

Miss Robertson certainly has a more perfect recollection. When I say a more perfect recollection, that is all I possibly can say; because, though she says she knew Mary Black M'Neill as Dr M'Neill's daughter, still it comes out in a future part of her evidence, that she applied to her father in the course of the ceremony going on, to know whether it really was Dr M'Neill's daughter. With regard to Mr M'Gregor, the evidence is pretty nearly the same with that which her mother gives. The one contradicts the other, both in the fact of there being a lighted candle, and in the fact of there being marriage lines; and the two agree in no one thing but a very important fact, on which I shall presently comment, that Mary Black M'Neill did not utter a word from the time she came into Mr Robertson's house to the time she left it.

My Lords,—Taking, then, the viva voce evidence in its utmost extent, your Lordships have only the evidence of one suspicious witness that can tend in the smallest degree to identify the parties who were alleged to be united by this marriage ceremony; and your Lordships well know, that, according to the law of Scotland, one witness is not sufficient to establish a fact. You must concur with me, therefore, in thinking, that there is no proof whatever upon which your Lordships can rest a judicial decision that there was any ceremony took place on the 23d of May 1816. My Lords, the parties seem in some degree convinced of this, and accordingly the defect in the evidence is attempted to be made up, throughout the whole proceeding, by appealing to judicial admissions, and to extrajudicial admissions, which it is proved Miss Mary Black M'Neill made.

Now, my Lords, I am at present looking at this case with a view to ascertain whether there is evidence that any ceremony took place, and therefore it is needless now to enter into the substance of those admissions; but I wish your Lordships to consider this question, whether it is possible that, in a case such as this, where you have evidence of a legal marriage subsequent to the irregular one said to have been contracted, the admission of the party should be received as evidence that the first marriage actually did take place? My Lords, if such admissions are received as sufficient evidence, there is no woman who has a fortune of her own, and who wishes to get rid of her husband to whom she is married, and to betake herself to the arms of her paramour, that might not by connivance get him to bring a declarator of marriage, and subsequently establish the fact of a previous marriage

June 20. 1828. by her own admission. There is, perhaps, a feeling of delicacy in the other sex that is not so prevalent in ours, which might prevent the frequency of such an occurrence; but if the principle applies to one sex, your Lordships must conceive that it applies also to the other; and then any married man who has married a lady that bona fide believes him to be unmarried,—any man who has contracted an alliance with a lady of distinction, by whom he has many children born,—if he takes a dislike to his wife, may get a similar proceeding instituted, on the ground of his having engaged in a previous marriage, alleging that there is evidence of that fact; and then the man has only himself to admit it, to the effect of destroying the status of his own children born in lawful wedlock, and of ruining the reputation of a woman of high rank and of great family connexion, and who never dreamt of the possibility of such an occurrence. Your Lordships must therefore be convinced, that this would be a precedent of the most dangerous nature. It has been stated, that the law of Scotland, with respect to divorce, gives too great a latitude; but establish this principle, and then I will venture to say, this House will have very little cause, in future, to comment upon the law of divorce in Scotland; because this new device for obtaining a divorce would be so much more easy, and so much more rapid, that I cannot doubt it would totally supersede that law, (upon which I have heard criticisms sometimes in this House), and do it away as effectually as if it were repealed by Act of Parliament.

My Lords,—I must contend, therefore, that as there is no viva voce evidence establishing that this ceremony took place; and as the documentary evidence is of such a nature that your Lordships cannot possibly rely upon it; and as I trust you will not admit as evidence the admissions of the party to prove such a fact—in point of fact, there is no legal evidence that any ceremony took place, such as your Lordships can say ought to bring home conviction to a judicial mind.

But, my Lords, supposing that you could rest upon the admissions of this lady, I wish your Lordships would consider how far the admissions could in the smallest degree promote the object of the respondent at your Lordships' Bar. The general tenor of her admissions amounts only to this, that 'the pursuer one evening, after Dr M'Neill 'had retired to his own room, the 23d of May 1816, it is believed, 'came to the house, and begged the memorialist to accompany him 'to Mr Bridges, who had been in the use of transacting business for 'Dr M'Neill, and to whom he said the Doctor had instructed him to 'make some communication. The memorialist, who knew that the 'pursuer was frequently employed by her father in that way, and who 'naturally enough supposed that her presence might be desirable, 'consented to go. When they reached Edinburgh it was late, and 'the pursuer then alleged that Mr Bridges would not be in his writing 'office; but, under pretence of going to a house where he might get 'some refreshment before conducting her home, and where Dr M'Neill

'was sometimes in the use of calling for the same purpose when in 'Edinburgh, the pursuer, instead of conducting the memorialist back 'to her father's house, persuaded her to accompany him to Carrubbers 'Close, and having got her to the foot of the stair where Mr Joseph 'Robertson, of the Leith-wynd Chapel, lived, he insisted that she 'should go to Robertson's house with him. Upon her expressing her 'anger at this attempt, he spoke to her like a desperate man; said 'that Mr Jolly should forfeit his life for her obstinacy, that he would 'destroy the Doctor's deeds in her favour, and used other violent 'and threatening language, in the view of intimidating her into a 'compliance with his request. Agitated and alarmed at the purport of 'this discourse, she found herself unable to resist, and was led almost 'insensible into Mr Robertson's house, who, on receiving from the 'pursuer a present of one or two pounds, proceeded to hurry over a 'marriage ceremony, without asking her any questions, without any 'exhortations, without ascertaining that her appearance there was free 'and unforced, and without receiving any expression or indication of 'consent.' June 20. 1828.

Now, my Lords, what does this admission amount to? If there was a marriage before Mr Joseph Robertson, it was undoubtedly an irregular marriage, and in law must be considered as such. Now, without troubling your Lordships with reference to the reasoning on the law, as laid down by Mr Erskine and Lord Bankton; without referring to the opinion of Mr Hume, to the opinion of Mr Craigie, to the opinion of Mr Erskine, or Mr Clerk, and all the great lawyers given in the case of Dalrymple v. Dalrymple; I will venture to say that I may state this without fear of contradiction, that in the case of an irregular marriage in Scotland it is the practice, and it is the law of the country, to take evidence of all the facts and circumstances antecedent to the alleged ceremony, of all the facts and circumstances pending the ceremony, and all the facts and circumstances of the conduct of the parties subsequently to the ceremony; and that, from a complete view of all these circumstances, you are to infer whether that real and deliberate consent was given which constitutes marriage;—and in doing this, you do not resort to the conduct of the parties subsequent to the ceremony, for the purpose of undoing a marriage contracted,—but for the purpose of learning whether the parties did or did not, by their conduct, exhibit a conscious feeling that no such ceremony had taken place between them, as was sufficient to lead them, in their own minds, to the conclusion that they were married persons. Now, my Lords, I will venture to say, that looking at the conduct of the parties before the ceremony,—looking at the circumstances proved to your Lordships at the time of the ceremony,—and looking at the conduct of the parties subsequent to the alleged ceremony, There is not a case in all the books where there is half the mass of evidence to shew, first, That the parties did not think a marriage was to take place; secondly, To shew that the

June 20. 1828. circumstances which attended the ceremony ought not to lead us to feel that a free consent had been given; and, lastly, To prove that neither the one nor the other ever conducted themselves, in any one instance, in such a manner as to lead any reasonable mind to conclude that they felt that a consent had been given.

My Lords,—How does the evidence stand? I will not go through it in detail—it would take up too much of your Lordships' time to read it; but I have made some short extracts, to which I will refer your Lordships, to shew that Mr M'Gregor himself, antecedent to this alleged ceremony taking place, uniformly held that there was not the smallest chance that he should marry this woman—that he knew she was pre-engaged to Mr Jolly. Upon this subject you have the evidence of a witness who cannot be suspected, Mrs Christopher Robertson, the step-mother of Mr M'Gregor's first wife, who states this:—'Mr M'Gregor told me he had been with them in the west country;' (a circumstance which shews the probable date of this communication): 'I asked him if he was going to be married to the defender? he said, 'No—Dr M'Neill says he thinks I will be the man, but I think it will 'be Mr Jolly, for I know her pre-engagement to him.' Margaret Robertson, the daughter of this Mrs Christian Robertson, and her sister Mrs M'Naughton, state that they were present when their mother had this conversation, and they prove the same thing to have taken place.

You have then the evidence of John Carr, in which he says, 'That 'he was walking down Leith Walk towards Leith in company with the 'respondent M'Gregor and John Manderson, a witness cited for the 'appellant, and upon returning back again they met, towards the head 'of Leith Walk, Mr Jolly and Mary M'Neill: That M'Gregor stopped 'and had some conversation with Mary M'Neill and Mr Jolly, and upon 'his joining the deponent and Manderson, the deponent asked him if Mr 'Jolly and Mary M'Neill were married, to which he replied that they 'were not married, but that they would shortly be so;' not therefore contemplating his own marriage, but, in conformity to the testimony of the witnesses already quoted, stating that such a marriage never would take place, because she was previously attached to Mr Jolly, and that the marriage would soon take place between Mr Jolly and her.

You have next the evidence of Mrs M'Naughton, another daughter of Mrs Robertson, who states, in confirmation of her mother and sister, that she heard Mr M'Gregor say that Mr Jolly would be the man; that she knew of his pre-engagement with Mr Jolly. And afterwards you have a witness beyond all suspicion, I might almost say one who stands in the situation of being the only witness beyond suspicion, I mean Dr Robertson, the clergyman who is supposed to have performed the ceremony of marriage betwixt Mary Black M'Neill and Mr Jolly, who says that a general report had taken place in the parish that she, Mary Black M'Neill, was to be married to Mr Jolly. How then does

the evidence stand antecedent to the marriage? My Lords, if it had been to be proved from circumstances of this sort, antecedent to the marriage, that there was a design of marriage with Mr Jolly, you would have had satisfactory proof; but with reference to Mr M'Gregor, there is not any one circumstance which does not go to shew that he himself actually believed that it never would take place. June 20. 1828.

Now, my Lords, what is the proof of what occurred at the time of the marriage taking place? You have this plain matter of fact, that both Mrs Robertson and Miss Robertson say, that Mary Black M'Neill never gave any consent whatever; that she never uttered a word during the progress of the ceremony. Now, my Lords, I admit that, in the case of a regular marriage, when the parties come before a clergyman after due proclamation of banns, where they have given their consent to the marriage as expressed in the marriage settlements antecedent to the marriage, that a nod of the lady, or a bow in the church, would be evidence of consent; but where you know that people have been hired to personate others in making that bow and that nod, (as in the case of Dow v. Adie), where you know that every irregularity has taken place, and has been practised, something more is necessary than that nod which might be sufficient in the case of a regular marriage—in such an irregular marriage it is indispensable that consent should be really expressed, which is not the case according to the evidence we have here received. Neither is there any proof of a consummation. M'Gregor, it is true, alleges, that he attended Mary Black M'Neill home to her father's house on that day. My Lords, upon other occasions, where parties have gone to the father's house, and passed the night in that house, that might be a circumstance the proof of which should produce some effect; but your Lordships will recollect, that Mr M'Gregor had a bed in the house, that he was in the regular habit of sleeping there: and the fact is, that there being no evidence of her being in the same bed with him that night, is rendered much stronger from the circumstance of Mr M'Gregor having a bed in the house; for your Lordships must feel that the absence of that testimony is more remarkable, as there was not a servant of the house who might not have been questioned, first, as to whether Mr M'Gregor slept in his own bed; secondly, as to whether he passed the night with Mary Black M'Neill; either of which circumstances would have led to a definite conclusion on this important point. Now, my Lords, what is the conclusion to be drawn from this state of the evidence?—First, I say you have proof that the parties in no respect contemplated a marriage, antecedent to the alleged ceremony;—secondly, there is absence of all proof of consummation, which, by the bye, is not even alleged in the summons; for there is an allegation of the consummation of the marriage at Holytown, but not of the marriage at Edinburgh. Thus far, then, I maintain, that you have no circumstances established on which a

June 20. 1828. presumption can be founded, that, at the time of this irregular ceremony, any real consent was given by the parties.

Now, my Lords, I wish to call your attention to the conduct of the parties after the marriage. I have already commented upon the interlocutor of the Commissary Court, wherein it is found that the inference of matrimonial consent is not contradicted by any part of the pursuer's conduct immediately following the marriage ceremony; and I have shewn your Lordships, that even from the time of the celebration of the marriage, the conduct of Mr M'Gregor and the conduct of Mary Black M'Neill was such as to satisfy every body that they were conscious of not being married persons. Why, my Lords, not to call your Lordships' attention at length to what each of the witnesses says upon this occasion, I find, that from the time of this marriage Mr M'Gregor was in the habits of regularly visiting Mr and Mrs Jolly: there are no less than eight witnesses who prove being present when they heard him drink their health as Mr and Mrs Jolly; there are witnesses who state to your Lordships distinctly that they recollect seeing Mr M'Gregor having a pair of new gloves, which, the witness John Carr says, according to the best of his recollection, he said he had received as a present at the marriage of Mrs Jolly. This man, who tells you that he was married upon the 23d of May—who tells you that, a few days after, he took such an aversion to this woman on account of her conduct in Pilrig-street with Mr Jolly, that he formed the resolution of divorcing her, though afterwards he brings an action for adherence;—this man, I say, is proved to have, on the 19th of June, within a few days of this, received a present of gloves upon the occasion of her marriage to another man. But is this all, my Lords? No.—You have this Mr M'Gregor sitting in the same seat at church, listening to divine service, and afterwards walking home to enjoy conviviality with Mr and Mrs Jolly for the rest of the evening. Is it possible, my Lords, to believe that there can exist such profligacy, as that this man, knowing that he was married to her, sits in church with the adulterer and adulteress, and goes home with Mr and Mrs Jolly to enjoy conviviality during the rest of the evening, drinking to their health as such? Must you not, under such circumstances, think that a man who could so conduct himself must have believed and known, that the marriage ceremony was not a ceremony that could be binding,—that in fact the parties had never given consent. On that ground his conduct may be explicable,—but on any other ground it is impossible to believe, that he could conduct himself in a manner so profligate and disgraceful.

But, my Lords, this is not all; for you have the evidence of a Mrs Margaret Miller, who tells you, 'that the day before Dr M'Neill's funeral she put the question to Mr M'Gregor, who it was that married Mr and Mrs Jolly? to which the pursuer answered, that it was Dr Robertson, minister of South Leith; and the pursuer at the same time mentioned, that he was personally present at the ceremony.' Now,

if your Lordships can believe this witness, surely there never did exist such a state of facts; but as none of the other witnesses seem to think he was present at the ceremony, the leaning of my mind is to the conclusion that he was not there: But that he very soon afterwards knew it, that he actually accepted gloves, is beyond all doubt; that he frequented the society of the parties, heard them drinking to the health of Mrs Jolly, and drank to her himself in that capacity; that he went (according to the evidence of Mr Hughes, and Mr Nicholson the tailor) with Jolly on the occasion of the death of Dr M'Neill, accepted mourning which Mr Jolly presented him with, and which Hughes and Nicholson both state him to h ave received, is equally undoubted. June 20. 1828.

My Lords,—Though these facts are strong enough to carry conviction to any one's mind, that it is not in human nature that a woman should have conducted herself in the manner that this woman is supposed to have done, if she was conscious that a marriage ceremony had taken place; or that a man should have conducted himself in the way that Mr M'Gregor did, if he had been conscious that the marriage ceremony took place; you have still stronger circumstances that tend to the same conclusion: for in the month of October following this marriage, Mr M'Gregor again attends Dr M'Neill to give his advice in the management of his property at Stevenston, accompanied by his daughter and Mr Jolly; and you have the evidence of Mary Hastie, the maid of the Inn, who proves, that there being only a double-bedded room, Mr and Mrs Jolly slept in the one bed, and Mr M'Gregor in the other. Can your Lordships believe that this man thought himself at that time married to Mrs Jolly on the 23d of May? Is it possible that he would not have run from the place, and sought a bed any where, and even slept on straw, rather than have disgraced himself by sleeping in a bed, and seeing the adulterer and adulteress (which they must in his estimation have been, if he had thought he was a married man) enjoying those rights which he had exclusively the privilege to enjoy, in a bed in the same room with himself? I say therefore, my Lords, that when you look at the evidence which has been produced in this case with reference to the conduct of the parties before marriage, the evidence which is adduced with reference to their conduct at the marriage, and the evidence that is produced of their subsequent conduct, it shews you that there is no reason to suspect there was any consciousness immediately before or after the supposed marriage, or at the time at which it took place, that they had really contracted marriage. If it had been otherwise, it is impossible there should not have been some evidence to shew that the parties had consummated the marriage as has been charged in the summons. And, lastly, it appears that there never were any two people who conducted themselves in a manner tending more strongly to induce your Lordships to believe that they were not married people, or to create a positive belief that they themselves never thought that ceremony was binding.

June 20. 1828. Here then, my Lords, I think I have made out that, in the first place, it is impossible under this summons, drawn as it is, to affirm the decision of the Court of Session, which is declaratory of a fact that is not even alleged; secondly, that it is impossible for your Lordships to find that there is in this case any legal evidence whatever, such as ought to convince a judicial mind that there was any ceremony took place at Edinburgh; and, in the third place, that the ceremony, such as it is, which the evidence attempts to persuade your Lordships did take place, is not a ceremony from which your Lordships can infer that deliberate consent immediately to enter into marriage which the law of Scotland requires.

I do not wish to occupy your Lordships' time by dwelling much upon the cases, but I will only call your attention to one or two cases which have been cited, to shew your Lordships the spirit of the decisions which have heretofore been made in this House, as well as by the Court of Session. My Lords, we have in the books cases similar to this in one respect, viz. cases of declarator of marriage, where there was a second marriage that avowedly took place; such as the case of Malcolm *v.* Cameron, and Napier *v.* Napier; and it is very important that your Lordships should advert to the evidence which Mr Hume gives in the case of Dalrymple *v.* Dalrymple. You will there see, that in those two cases he states, that the principal ground of deciding against the first marriage was, because the parties lived in the same town, and had allowed a second marriage to take place, and allowed a length of time to pass, that marriage being unchallenged. Now, my Lords, how much stronger is this case, which exhibits a person living in the same house, and accepting gloves on occasion of the second marriage ceremony, daily frequenting the society, and living in habits with the parties contracting the second marriage, and actually sleeping in the same bed-room with them? To be sure this is indisputably a much stronger case than that of Napier *v.* Napier; yet in that case the circumstances were found sufficient to induce the Court to decide against the validity of the first marriage, though there were strong circumstances to prove consent in the case of the first marriage.

You have then the case of Patrick Taylor *v.* Kello, a case decided in this House. In that case the parties exchanged mutual declarations, such as, if it had not been for their conduct either before or after the time of marriage, (which the Court always takes into consideration, pronouncing upon a complex view of the whole case), would in their judgment have constituted a marriage in the law of Scotland. The writings they interchanged were to the following effect:—The lady signed this:—'Skirling Mill, February the 16th, 1779. I hereby so-'lemnly declare you, Patrick Taylor, in Birckenshaw, my just and 'lawful husband, and remain your affectionate wife.' He on his part signed a similar paper, and signed himself her affectionate husband. My Lords, an action of declarator having been brought in the Court

below, the marriage was held to be valid, and it came to your Lordships' House; but it appearing to you that at the time of the interchange of those letters there was an understanding, which was inferred from the conduct of the parties, that those letters were to be given up on demand, this House reversed the interlocutor of the Court below, and found that there was no marriage. Now, my Lords, how feeble is this case in comparison of that which your Lordships now have before you? This is not a case where the parties agreed to withdraw the written documents on demand, but a case where the one party stands by and sees the other party married, and the other absolutely contracts a marriage, and they conduct themselves to one another as if they had never dreamt of the marriage ceremony having been performed. June 20. 1828.

Your Lordships have then the case of M'Innes v. More in December 1781, where the House of Lords reversed the interlocutor of the Commissary Court and of the Court of Session, because it appeared, that though the letters which were produced were sufficient to constitute marriage, they were delivered and written, not with the intent of contracting marriage, but with the intent of getting the lady the privilege of lying-in in the house of her own relations. Upon this ground the House of Lords reversed the judgment, shewing that, in a case where the circumstances were infinitely slighter than that of M'Gregor's, yet they were sufficient to destroy the effect of the consent to marriage.

Then, my Lords, you have a case, a very strong one indeed, the case of M'Gregor v. Campbell, where it appears that Captain Campbell, an officer in the army, formed a connexion with a woman who was cohabiting with him; that he admitted his brother officers and their wives to visit her as his wife; and that she was by habit and repute received as such: but on the validity of this marriage being challenged, it appeared that this woman had actually received wages and livery meal, which is board wages according to the language of Scotland; that she displayed herself not as acting in the capacity of wife, but in that of his servant. Upon that evidence the inference from other facts was rebutted, and it was declared that the marriage was invalid, because she continued to accept the wages which she had been in the habit of receiving antecedently. How much stronger is this case, where the party is proved to have connived at a marriage with another man living in habits with his alleged wife, and never stating any claim to her?

My Lords,—There is one branch of evidence, which I recollect has escaped me, and I do not wish to omit any thing which can either in one way or another be deemed of importance. What I allude to is the attempt to establish in evidence the intention of the parties, as is inferred from the evidence of Mrs Kinlay, alias Shewan. Mrs Kinlay is first examined in the year 1819, and she tells a story that she had received from Mary Black M'Neill three pieces of stuff for the pur-

June 20. 1828. pose of making a gown, and a piece of linen to make a shirt, stating, that on that occasion Mary Black M'Neill asked Mrs Kinlay to be a bridemaid; when pressed whether it was with a view to a marriage with Mr M'Gregor or Mr Jolly, she declared in the year 1819 that she could not say which. This woman is again examined in the year 1823, and somehow or other there is a great difference between the year 1819 and the year 1823. In 1823 it comes fresh to her mind that it was with a view to marry Mr M'Gregor, for she then in her evidence states, that she recollects perfectly, when she heard of the marriage with Mr Jolly, having said to Mrs Craig, 'Good God! is it 'possible she can be married to Mr Jolly, when she asked me to be 'her bridemaid upon the occasion of her marriage to Mr M'Gregor?' My Lords, it is needless to comment upon the evidence of a witness who stands in such a suspicious point of view, that in point of fact she recollects distinctly in the year 1823 facts of which she knew nothing in the year 1819, reversing the order of human nature with regard to her recollection, and recollecting that in 1823 which she did not recollect in the year 1819. But, my Lords, it so happens that the evidence of this woman, Mrs Kinlay, is contradicted in other respects, because, unfortunately for her, she herself states, that she gave that piece of linen to be made into a shirt to a woman of the name of Leslie, and Leslie states to your Lordships that she recollects dressing and carrying home that shirt on Saturday night. It must therefore have been with a view to the marriage of Mr Jolly, and not with the view to the marriage of Mr M'Gregor; because you will recollect that Mr M'Gregor first formed the design of this marriage upon Monday the 20th of May, and that the marriage did actually take place on the Thursday following, the 23d of May; and that there could be no intervening Saturday for this shirt to be delivered.

My Lords,—There is another point which escaped my recollection in going over the evidence,—I mean the details given by Mr White, the lapidary, and Mr Neill, the printer, brought by Mr M'Gregor with a view to shew that he, in two instances at least subsequent to the marriage, did play the character of husband to Mary Black M'Neill. Now I confess to you it is impossible for me to give credit to either of those witnesses. Can I believe that Mr M'Gregor brought his friend, Mr Neill, in the beginning of July, to the house of Dr M'Neill, for the purpose of introducing him to his wife, and introducing him to a person as his wife, from whom he had accepted gloves on her marriage with another man; and that he introduced him to a person as his wife of whom he had expressed his disgust in consequence of the interview in Pilrig-street, and declared a fixed and settled intention, as early as possible, of divorcing her? The story is not credible; and it is totally inconsistent with the other facts proved, of his drinking her health, and associating with her and Mr Jolly, they living as man and wife.

Neither can I believe the evidence of White the lapidary. Indeed

the whole force of it depends on whether, at the time of uttering the words imputed to Dr M'Neill, he was looking at M'Gregor or at Mary Black M'Neill. If Dr M'Neill was looking to Mary Black M'Neill, who was in the room at the time, he said that 'you will get it all by and bye,' the thing is quite clear; and that is much more probable, under the circumstances of the case, than that he was directing his eyes towards Mr M'Gregor, because your Lordships will recollect the whole detail of Dr M'Neill's conduct when present at the marriage of Mr Jolly.—Mr Robertson, the minister of North Leith, was clear and distinct that Dr M'Neill told him that he would take his part in giving away his daughter,—that he said to Dr Robertson, in reply to some observations of his, that he had done a great deal for the parties, and he would do more;—Can you believe that this man, within two days or three days of this having taken place, went to Mr White, the lapidary, for the purpose of declaring that M'Gregor instead of Jolly was married to his daughter, and uttering the sentence that he is said to have uttered, with a view to express that the whole of his fortune would belong to Mr M'Gregor? or is it not more reasonable to believe, that in point of fact all he meant to say upon that occasion was, fixing his eyes on his daughter, 'It will all be your's?' June 20. 1828.

On all these considerations I must submit to your Lordships, that it is impossible your Lordships should, under the circumstances of the mode in which this summons is framed, sanction and affirm the interlocutor of the Court below in this case;—that there is no evidence on which your Lordships can legally rely to prove there was any ceremony whatever took place on the 23d of May;—and that, at all events, the ceremony which is proved is such, taking into consideration all the conduct of the parties before and after, as, in conformity with your Lordships' former decisions, it is impossible you can say proceeded on that free, that deliberate, that real, and that immediate consent to enter into a marriage, which is the species of consent required in an irregular marriage under the law of Scotland. My Lords, with regard to the nature of the judgment, I will read at present the sketch of the judgment I am inclined to propose, but I should think it much better to delay this for the purpose of taking some time to consider how it should be worded. I confess, my Lords, that I should very much wish, that in this important case on the law of marriage in Scotland, your Lordships should introduce the allegations in the summons, as well as the conclusions thereof, so as to bring before the minds of the Judges in that country the precise grounds on which you determine: and I should think it very desirable, as the Court have obviously adopted the interlocutor they have pronounced, for the purpose of declaring that an irregular marriage had taken place at Edinburgh, that your Lordships should negative that conclusion, otherwise the effect of your judgment would be that of dismissing this action, but leaving the parties in such a state that they may bring a future action, charging an irregular marriage at Edinburgh, which I

June 20. 1828. am sure your Lordships would not wish, after all the litigation which has taken place. The heads of the judgment I would suggest to your Lordships are,—'That on due consideration of all the facts and circumstances established by the evidence in the Court below, in an action of declarator of marriage at the instance of Malcolm M'Gregor against Mary Black M'Neill, by summons on the 25th of March 1818, wherein it is set forth, that an irregular marriage was celebrated between the said Mary Black M'Neill, daughter of the late Dr James M'Neill, in the spring of 1816, at Holytown, which was consummated by their sleeping several nights together in the same bed; and further, that they considered it proper, on their return to Edinburgh in the month of May 1816, that no time should be lost in celebrating in facie ecclesiæ that marriage which had been irregularly celebrated between them; and accordingly that they were, in the month of May 1816, regularly married by the Rev. Joseph Robertson, minister of the chapel in Leith-wynd: It appears to this House that there is no proof whatever of any marriage between those parties having at any time taken place at Holytown, or any regular marriage in facie ecclesiæ having been celebrated at Edinburgh in the month of May 1816; neither does it appear to this House, taking into consideration the facts established in evidence in relation to the conduct of the parties, both before and after the 23d of May 1816, and all the other facts and circumstances proved, that there is evidence sufficient to justify the conclusion, that the said Mary Black M'Neill, and the said Malcolm M'Gregor, did at that, or at any other time, voluntarily and deliberately express that mutual consent immediately to contract marriage, which, by the law of Scotland, is necessary to give validity to an irregular marriage: That, on these grounds, this House reverses all the interlocutors complained of, and remits to the Court of Session, with instructions to the Commissary Court to dismiss the action of declarator of marriage.'

My Lords,—It would be sufficient merely to state that you assoilzie the defendant, Mary Black M'Neill, from all conclusions therein; but in this case I should prefer your Lordships' adopting this form—to dismiss this declarator raised at the instance of the said Malcolm M'Gregor, by summons of the date of the 25th of March 1818, absolving the appellant, Mary Black M'Neill, from the conclusions thereof, that she should be declared married to the said Malcolm M'Gregor.

Earl of Eldon.*—My Lords, If this was not one of the most important cases that has ever occurred in the course of my experience before any Court of judicature, I should be perfectly satisfied with what has been already stated to your Lordships, that there is sufficient ground to reverse the interlocutor of the Court of Session.

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* Revised by his Lordship.

But, my Lords, I am anxious, for different reasons, at least to occupy a short portion of your Lordships' time. I am extremely desirous that it should appear that this judgment, at least as far as I am concerned in agreeing to it, does not proceed upon suppositions and notions, which, unless we protest against them, may be understood to be involved in the effect of the judgment. My Lords, when I first looked at these cases, and saw that the summons concluded with desiring that it should be found and declared, not only that these parties were married, but that it should be decerned that the appellant should return to her husband,—that he should enjoy what is called in this part of the country a restitution of conjugal rights, I could not help feeling considerable doubt, whether, supposing there ought to be a declarator of marriage, this was a case in which, at the instance of Mr M'Gregor, you would compel this woman to return to cohabitation with him. I have reason to believe that no such judgment would have been given in this part of the island, and I have further reason, from what I see of the conduct of the parties, to believe that Mr M'Gregor had no wish that any such judgment as that should be given. When I look at the process with respect to the property, I think that his principal reason for praying a declarator of marriage was, not to repossess himself of the person of this lady, but to get the enjoyment of that property, to which he would insist, as the husband of his wife, he might have some claim. I desire, therefore, that it may be understood, if we are to consider this, as I believe it to be, an appeal from an interlocutory judgment of the Court of Session, brought under the authority of an Act of Parliament, (48. Geo. III. c. 151. § 15.), in consequence of a difference of opinion amongst the Judges, that your Lordships will be pleased to allow the individual who has now the honour of addressing you to say, that he does not admit, (he does not deny, because it would be improper that he should either admit or deny), that he desires it to be understood as standing quite neutral upon the question, whether this lady ever could be decerned to return to the embraces of Mr M'Gregor. June 20. 1828.

My Lords,—There is another point upon which I am exceedingly anxious to be perfectly distinct, and that is this, that when you are once satisfied that, according to the law of Scotland, there has been actually a marriage between A and B, no subsequent conduct is to be received in evidence in order to entitle you to say that that marriage, which has been actually had and actually celebrated effectually, is to be undone: if it be a regular marriage, actually celebrated and completely contracted, it is not to be undone upon probabilities arising out of subsequent acts and circumstances. On the other hand, notwithstanding what has been said about these Scotch marriages, that they are very easily formed and very easily got rid of, I take it there is nothing that the law of Scotland more clearly, more solemnly, or more consistently insists upon than this, that where a marriage is alleged to have been had by a promise per verba de presenti, or by a promise per verba

June 20. 1828. de futuro, or by virtue of the implied promise that arises out of habit and repute;—there is nothing it does so solemnly require, as that the consent to marry should have been full, deliberate, and free,—that it should neither be the effect of force nor fraud.

My Lords,—I desire also to give no opinion upon the question at present, for it is not before the House, though it is a question of very great consequence in my judgment, namely, whether you can or cannot, there having been a regular marriage in facie ecclesiæ, give evidence whether the marriage intended to be had was effectually had. Upon that I desire to express no opinion whatever, upon which some cases are to be found in the prints upon the table.

My Lords,—I am therefore exceedingly anxious, in this very important case, to press upon your Lordships' attention this, as what I take to be an indisputable proposition in law, namely, that if you find there was a marriage duly celebrated, actually had, that marriage cannot be got rid of by evidence of facts and circumstances done or observed by persons afterwards thinking it proper to disentangle themselves from the connexion of marriage, actuated by caprice or dislike of each other, or the base motive of inducing other persons to think that they may form matrimonial connexions with parties;—when once you have got clearly to the conclusion that a marriage has been had, that marriage must be sustained, let the consequences be what they may in consequence of sustaining it with respect to third persons. Therefore the question now before your Lordships is really this, Was the ceremony that did take or is alleged to have taken place, at Joseph Robertson's upon the 23d of May—was it a mere ceremony gone through, or was it, on the other hand, an actual constitution of marriage? If it was an actual constitution of marriage, I am afraid we must consider it an actual constitution of marriage. You cannot undo it by reasoning upon circumstances which may have great weight upon your minds, leading you, however deeply, to lament that any such thing had taken place.

My Lords,—I would beg to add here, that, in giving my humble opinion upon this case, I feel myself fortified by what I have been desired to state, that, upon a very anxious attention to this case, a noble relative of mine, who long held the situation of Judge in the Ecclesiastical Court of this country, gives his full assent to its being stated to your Lordships, that he could not possibly sustain this marriage.

My Lords,—Having said thus much, I am led to revert now to the consideration of the substance of this summons. I hope I may be excused, taking into consideration that I had the honour of sitting in an important judicial seat, the most important judicial seat in this House, for nearly twenty-five years, if I take the liberty to repeat, perhaps for the last time, that which I have often before stated, that I do most anxiously wish, whilst on the one hand no man has been more desirous than I have been, whatever may have been said to the contrary, that questions arising upon the law of Scotland should be decided here upon the grounds and principles of that law, and that we should not govern

ourselves by English principles, or the application of English law, where it cannot be applied consistently with the principles of the law of Scotland: I say, I trust I may be excused if I may express my anxiety, for the sake of the judicature of that country, that their pleadings may be somewhat more accurately attended to than they usually are. I have been very much struck with the extraordinary nature of the present summons from the first, both upon the intermediate consideration of this case, and upon the present consideration of this case. Taking the summons to be what we call the declaration of the party the pursuer, it is next to impossible for any man to reconcile what he is pleased to state in the summons, with what the real nature of the case is as he has since made it out by the proofs he has offered to you, in order to induce you to decern in his favour. June 20. 1828.

My Lords,—I shall not trouble your Lordships by repeating what has been very accurately stated already upon the subject of the connection, not the relationship, but the connexion, that subsisted between these different parties, before the occurrences which form the subject of your Lordships' consideration took place. I begin, therefore, by adverting to the journey to Holytown in the spring of 1816; and let it be remarked, that unless I have deceived myself upon looking at this evidence, or by looking at it too often, which is sometimes the case,—let it be remarked, that before the journey to Holytown it seems to have been pretty well known to Mr M'Gregor that Mr Jolly was a suitor to this lady, and not only a suitor of this lady, but Mr M'Gregor seems to have felt that Mr Jolly was preferred by the lady to himself. My Lords, Mr M'Gregor, and Dr James M'Neill, who, let it be observed, was a clergyman as well as a medical man, go, according to the summons, to Holytown in the spring of 1816, on a jaunt, in company with the appellant, natural daughter of Dr James M'Neill, where an irregular marriage between them is alleged to have been celebrated by Dr James M'Neill; that an irregular marriage is alleged to have been celebrated, and the marriage to have been consummated by their spending several nights together in the same bed at Holytown aforesaid. If you come to look at the condescendence, that important circumstance of sleeping in the same bed is softened down to something of this nature, —to its being stated that they slept in the same room; and the actual fact is disguised, both in the summons and in the condescendence,—that fact which has been spoken to by Mary Hastie, a servant in the house, and who represents this——But before I state what her representation is, give me leave to say, that this matter of consummation that is alleged to have happened at Holytown was capable of proof, and might have made an end of the whole matter; but instead of there being any such proof, all the proof that there is, the great weight of evidence as far as relates to it, is the testimony given by Mary Hastie, which goes directly the other way. If it had been true that Dr M'Neill, a clergyman, married these parties,—if there was mutual consent on both sides, and Dr M'Neill, the father of the lady, a clergyman, gave

June 20. 1828. the benediction, and put their hands together in the manner that is stated in the condescendence,—if that had been true, what difficulty was it likely there should be (unless Scotchmen differ from Englishmen) in their going into the same bed,—there would have been consummation quite of consequence,—it would have been the natural consequence, and nothing else could have happened.

Now, what Mary Hastie says upon that is,—and if consummation, which with respect to this marriage you observe is stated in the summons, had taken place, had followed, it was impossible that Mary Hastie's evidence can be true, but there is nothing to contradict it;—what she states is this, that it happened unfortunately in this Scotch inn that there were not beds enough, or, rather not rooms enough, for three persons to have separate rooms, there being two beds in one room, and one bed in another; and the Doctor having taken care of himself by going to bed first, a difficulty arose what was to be done; it seems a difficulty existed in the actual circumstances, viz. that the bride and bridegroom, as the summons represents them, could only find out one room with two beds in it. I think they could in all probability have been satisfied with one bed, if they had been married at that time, as it has been alleged; at least I should suppose so. But an arrangement is made in a very curious way, and as far as we have any evidence, instead of there being consummation, we must hold there was no consummation, because Mary Hastie says, that the lady was disturbed at the idea of sleeping in the same room with her newly acquired husband—that he slept in one bed and she went to another bed; but she had just so much delicacy, which I am very glad to see among our neighbours in the north country, that she would not go to that bed, unless it was surrounded by sheets, so that even her husband could not set the eyes of his affection upon her. They accordingly slept in separate beds the whole night; and instead of any body being called to prove those circumstances, which would have been undoubtedly proved to establish consummation if it had taken place, the whole evidence tends directly the other way.

What is done next? The parties return to Edinburgh upon the 20th of May in the same year 1816, and this ceremony at Holytown having been thought very irregular, though Dr M'Neill was a clergyman, no consummation of the marriage having taken place, it was thought there should be some regular marriage. So the summons states it, or rather, that that marriage at Holytown should be regularly celebrated at Edinburgh. This marriage at Holytown is in the summons considered as an irregular marriage, and in the proceedings no proof is made of it. If this was an irregular marriage, the defect of proof of which was to be supplied by another ceremony of marriage at Edinburgh,—if that marriage at Holytown, as the summons states it, was to be regularly celebrated at Edinburgh,—if this celebration was to be free from all objection, M'Gregor proceeds on the most uncommon course that, in

affairs of this kind, one has ever heard of. See how it is carried on. June 20. 1823.
On the 20th they get to Edinburgh. There I may as well state, that a regular marriage in Scotland is, as I understand it, a marriage after publication of banns has taken place three times. In Erskine's Institutes he gives a very good reason for that; he says, that the banns must be proclaimed three times in the church, because it gives people time to consider whether, by the third Sunday, they will or not consent; but Mr M'Gregor thinks that the right way of getting rid of the difficulties that belong to that irregular marriage, and that private marriage at Holytown, is to do what? is, that the right way upon the 23d is to have, or to procure, or to endeavour to procure, a certificate of the publication of banns as having taken place upon three Sundays, which could not possibly have taken place, because between the 20th and 23d no Sunday whatever could have intervened; and then he thinks it proper to apply himself to Mr Smyth, stating that he means to be married that night. Mr Smyth mentions it to his clerk, and some persons connected with him, and they have a direction given them where to attend upon that night. Mr Smyth himself could not go; the clerk, I think, does go, according to the direction, to the Black Bull, and he finds nobody there. But this ceremony of marriage is had in the evening late: there is a difference about the time of night, Mrs Robertson saying there was a candle, and Miss Robertson saying there was no candle; but for the purpose of having a public indisputable regular marriage celebrated before Joseph Robertson, there were Mrs and Miss Robertson present at the ceremony, which I suppose could not have been made any better by his being also a clergyman of the church of Scotland than the marriage by Dr M'Neill himself, he being also a clergyman of the church of Scotland. A ceremony passes at the time of night spoken to by Mrs Robertson and Miss Robertson, and that is the only evidence, unless it is supposed to be evidenced by the book, the contents of which are inconsistent with some other parts of the evidence,—a book with reference to which I have wished to hear, but I have not heard yet, what made such a book as that produceable in evidence. It may, however, be so. I know why a register in England is admitted in evidence, because it is kept according as the law requires it to be kept. The law requires that there should be such a register, kept in a particular manner and form; but whether a private book kept by a private clergyman, not in such manner and form, not under and according to the authority of the law, would be evidence in England, is a question which could scarcely bear to be agitated.

Now I will not follow my noble and learned friend—if I may take the liberty of calling him so—through all his statement of this case, because upon such a subject as this he is much more competent to speak than I am; and I am happy to acknowledge, at this time of my life, the benefit I have received from his communications with me upon the Scotch law;—I will not follow him in discussing the effect of the evidence of Mrs and Miss Robertson, as to its being or not being defective in the respects in which he has contended that it is defective.

June 20. 1828. After observing that I wish not to be understood to have conceded it to be clear, that a cause of this sort should go on without other parties to it; or that there is not great danger in admitting a marriage certainly unobjectionable in form and circumstances, such as the marriage with Mr Jolly, to be affected by the admission of the woman who is represented to be a party in both marriages; I proceed here to say, that notwithstanding all the difficulties that rest upon the testimony of Mrs Robertson and Miss Robertson, I must look at this case as a case in which the woman's admission has been read and used as evidence; and whatever observation may be made upon the evidence of the Robertsons, as not sufficient to prove the identity of the parties or the particulars of the ceremony, in her admission this lady herself has made an acknowledgment that some ceremony of some sort took place at the house when she and M'Gregor were present. But then you must take the whole of her admission together; and taking the whole of her admission together, the question turns round again to be this, Can you, or can you not, admit evidence of facts and circumstances antecedent to that period? Can you, or can you not, admit evidence of facts and circumstances subsequent to that period, with a view to aid and confirm her in her admission, taking it altogether, in which she represents, that what then passed was not a case in which she can be held to have given consent, much less that free, solemn, full, and deliberate consent upon which M'Gregor claims as against her the character of husband?

Now, my Lords, that you may, with respect to what are called irregular marriages in Scotland, look at prior facts and circumstances, and that you may look at the subsequent facts and circumstances, I take to be quite indisputable. The next question therefore is, Can you look at such facts and circumstances with respect to an alleged marriage such as has been had in this case? Can you look at them as evidence to enable you judicially to determine whether there has been effectually had a marriage?

With respect to the irregular marriages generally, there can be no doubt at all, looking at the text writers,—there can be no doubt, if you examine the opinions of the Scotch lawyers which are to be found annexed to the case of Dalrymple v. Dalrymple; and I take it that the opinions of Scotch lawyers would be evidence of what is Scotch law. We have the illustrious names which are here mentioned, to which I may generally refer your Lordships. We have the illustrious names of Erskine, Craigie, Hamilton, Hume, Hay, and a gentleman that I shall call by the name of John Clerk, for fear you should think I am mentioning myself, and Cathcart, and Gillies, and Sir Islay Campbell.

Then the next question is, Is this alleged marriage, such as it is, to be looked at by the application of the same rules of law that apply to the marriages mentioned in the books as irregular marriages? My Lords, I find in these papers that doctrine of the same nature has been applied in two or three cases, even of regular marriages. I have already desired to protect myself against it being understood that I give

any opinion, whether it can or not be applied to what is strictly called a regular marriage in facie ecclesiæ; but if there have been decisions that apply them to regular marriages in facie ecclesiæ, surely there can be no difficulty in applying them to a marriage that is not a regular marriage; and then comes the question, is this a regular marriage? June 20. 1828.

Now the authority of the text writers holds this not to be a regular marriage, because they say it must be a marriage with proclamation of banns. Here there could be no proclamation of banns. My Lords, I cannot adopt that expression without guarding myself against its being understood that I mean to intimate, that if there is an irregular marriage without proclamation of banns, but where there has been a full, actual, deliberate consent given, that any subsequent circumstances will authorize you to say that that irregular marriage can be represented in any way as invalid. I do not mean to call in question at all the validity of such marriages—God forbid I should; but if you have defective evidence with respect to the actual proof of a deliberate, clear, and solemn consent in the transaction of the ceremony, the question then is, Whether you may not admit evidence with respect to this species of marriage as an irregular marriage, that you will admit with respect to other marriages that are acknowledged to be irregular marriages; and seeing that it is constantly admitted in irregular marriages, it does appear to me, I own, in this case, admissible evidence.

The next question will be, If it is admissible evidence, what is the effect of it? Now undoubtedly, with reference to that, I must say, with those eminent men whose names I have mentioned, that though there may be with respect to a great many cases doubts whether those decisions are just applications of the evidence upon the effect of which the decisions have been made, that does not affect the principle at all of the admissibility of the evidence, and the duty of the Court to attend to the full effect of the evidence, according to the best of its judgment, when that evidence is offered to its consideration. My Lords, with respect to cases of marriage where the young man is 14 and the young lady 12, there are cases in which, perhaps, more effect has been given to the supposed operations of deceit and fraud upon such persons than perhaps can be fully justified, recollecting that the law has said, that at those ages they are perfectly capable of giving full and deliberate and sufficient consent; though some allowance must be made for the difference of discretion between 21 and 14, yet, with respect to this particular contract, the law, strictly speaking, has held them equally capable as older persons of giving their consent. With respect to all the cases to which I am now alluding, both with respect to those very young persons, and with respect to other persons, in those cases that have fallen under consideration of the Courts, it does appear to me one matter is considered worthy of great consideration, What is the effect of all that passed? With respect to the question, Was free, deliberate, full, and solemn consent given at the time the ceremony passed, or did the ceremony pass without that which con-

June 20. 1828. do not find any evidence of that; if there is any evidence of it, I have passed it by.

Lord Chancellor.—No, there is not any.

Earl of Eldon.—When you come to consider, that after this Mr Jolly is united to this lady upon the 13th of June, I think it is in the subsequent month; and when it is proved that Dr M'Neill, who is said by this summons to have given his consent to the marriage, and performed the ceremony of marriage himself at Holytown; when you consider that he is present, goes to Dr James Robertson's, that he goes there, and conducts himself in the deliberate, solemn, serious manner in which Dr Robertson states his conduct to have been regulated, whilst he gives away his daughter to Mr Jolly; when you consider further, that here has been an attempt made to prove, (let those believe it who can, after having read the evidence of Dr Robertson, and of his lady), that this Dr M'Neill was in a state of utter imbecility, either from drunkenness, or a failure in his constitution, or some other cause, between the journey to Holytown and this marriage upon the 13th of June;—I say, that the evidence in my judgment, which goes to impute to Dr M'Neill (in order to render inefficacious the evidence on the other side as to the state of Dr M'Neill) that imbecility, from whatever cause it arose;—that evidence, I say, must have been brought for the purpose of destroying the effect, the dreaded effect, of the important inferences to be drawn from his attendance on the marriage of the 13th of June, and his non-attendance upon the other on the 23d of May. The attempt to prove that imbecility wholly fails; and I should have thought myself bound upon my judicial oath, if I had been trying this before a jury, to have told them they ought to give no credit to that testimony.

My Lords,—It does not rest there. So far from Mr M'Gregor supposing he had a right to the person of this lady, I find in the evidence, that it is usual to give the friends, upon a Scotch marriage, gloves; that is the present that is made to them; and Mr M'Gregor receives a present of gloves, as a friend and well-wisher to the parties who had just been married. He does not attend, I believe, at the wedding-dinner, but he very frequently afterwards is to be found as a guest in the house of the parties. And when we come to the month of October in the year 1816, these parties go to Holytown again, and the Doctor goes too. He was so far recovered from this imbecile state, in which it was attempted to be proved that he was at the time of the marriage in June 1816,—he had so far recovered from his malady, as to be able to go there again. Mr Jolly and Mrs Jolly, and Mr M'Gregor and the Doctor, form the party: and here let us see whether we can come exactly to the conclusion, that parties are sleeping in the same bed, because they are sleeping in the same room as in the antecedent spring. What is the conduct of Mr M'Gregor, who is now to convince us there was a real marriage, with full, free, and deliberate consent, given upon the 23d of May 1816? He is at Holytown along with the parties.

What are the beds required? Dr M'Neill is there, and has a bed to himself; another is required for Mr and Mrs Jolly, and Mr M'Gregor contents himself with a bed for himself, as I understand the evidence. Let me fairly say, that Mary Hastie does not say expressly that Mr and Mrs Jolly slept together in the same bed, but she says she gave them a bed, because a bed was asked for—for Mr and Mrs Jolly. According to the first marriage at Holytown, Mr M'Gregor and his lady, as she must be supposed to be then, according to his case, lie in different beds, when there could be no reason in the world why they should not follow the good advice of Dr M'Neill, for he must be taken so to advise, if he had married them, by getting into the same bed; and then, after it is supposed she had been deliberately married to Mr M'Gregor, having taken a fancy to be married to Mr Jolly when they meet in October 1816, Mr M'Gregor then does not sleep in one bed and she in another, but, according to all that is the probable effect of this evidence, Mr M'Gregor sleeps in one bed, and Mr and Mrs Jolly in another; and that is to be taken in Scotland, which would not in England be taken, to be proof of a deliberate consent, that Mr M'Gregor was the husband of the lady, and not Mr Jolly. June 20. 1828.

My Lords,—I will call your Lordships' attention to another circumstance:—Mr M'Gregor had been in some measure or sort employed as the man of business of Dr M'Neill. Dr M'Neill had made a provision for his daughter, this Mrs Jolly or Mrs M'Gregor, according as your Lordships shall determine her to be the one or the other. He had given her not the whole of his substance in the first instance; however, from a sense of duty to his natural child, he seems to have thought it was necessary to give her the whole of his substance, and he gives it her by deed. Those deeds were put into the possession of Mr M'Gregor, as I understand the case, and Mr M'Gregor might naturally enough think, that if he was to tell this story to Dr M'Neill about this lady having first married him with his consent at Holytown, and then married him again at Edinburgh, for the purpose of having no doubt left upon the effect of the Holytown marriage; and that she had then married Mr Jolly afterwards, and in the Doctor's own presence, and given away by him; he might perhaps think that all the Doctor's good intentions in favour of this lady might be frustrated if he told the Doctor of these most improper transactions on the part of his daughter, as they must be admitted to be, if Mr M'Gregor represents what were really the facts of the case. He is silent, as is alleged for some such reason, until Dr M'Neill died. But speaking the truth after a man is dead will not enable him to act as if he was a living man. When therefore the Doctor was dead, does M'Gregor claim his wife? No; he attends the funeral, where Mr Jolly acts as chief mourner, and not Mr M'Gregor. After the funeral, the deeds are called for; he delivers them himself; he is as a visitor to Mr and Mrs Jolly, as other friends visit Mr and Mrs Jolly for some time, and he says nothing about this marriage till about the month of December 1817. Then,

June 20. 1828. in that December 1817, my Lords, he makes a claim of marriage,—it has escaped me if the proofs establish an earlier claim. Permit me, my Lords, to say, that when I first read this case, I thought it a case so disgusting with respect to the moral conduct of the respondent, that nothing upon earth would have induced me to give my opinion upon it whilst I was under those impressions. I therefore made a covenant with myself, that no detestation of the conduct of this gentleman should influence my judicial mind. I trust and hope that it has not. I have nothing to do with the case except merely as to the law of the case, as it applies to the established facts. My Lords, what he then does is to state, that he has a claim of marriage, and your Lordships know the nature of his claim; and he then lodges his summons for the purpose of having a declarator of marriage, according to the prayer of the summons, that this virtuous lady, as he must think her, might be restored to his arms, that she might live happily with Mr M'Gregor, as Mrs Jolly or Mrs M'Gregor. But this claim is not brought forward till after all those circumstances had taken place. Notwithstanding all that, it is your Lordships' duty, if, under these circumstances, you can believe that there really was a marriage constituted, effectually constituted, upon the 23d of May, it is your duty, notwithstanding all that, to say she must be restored to his arms. Whether you ever will restore her to his arms I do not know, but I do not think that your Lordships will readily make yourselves a party to that sort of business.

My Lords,—My judgment, with respect to this declarator, goes upon this, that regard being had to the nature of the evidence which your Lordships have, it appears to me there is no reason to believe that there was a free, deliberate, and full voluntary consent given to constitute immediately the relation in law of man and wife at the house of the priest Robertson; that there is no reason from the proof to believe that there was consummation. The circumstances go to shew there was no such consent. They are evidence that the marriage was not understood by this gentleman himself to be a binding and valid marriage. This appears clear from his conduct subsequent to it, as well as from his conduct prior to it; the whole tends to shew no such consent was given; and although her story is improbable, it is not half so improbable as his story.

Under all the circumstances, admitting as I do the extreme danger that attends all questions about the dissolution of supposed marriages; looking on the other hand to it as a most important principle, that you should see that the most sacred relation of life is formed deliberately and fairly; upon the whole, I think the decision you ought to come to, (in all these cases you cannot, perhaps, be quite safe,—all that you can do is to be satisfied, when you pronounce judgment, that you are pronouncing the real effect of the proof), the best decision, in my opinion, is, that which should lead you to reverse this interlocutor of declarator of marriage.

I will again repeat, that if this declarator of marriage should be

supported, I still should entertain very considerable doubts indeed, whether, regard being had to all the circumstances of this case, the Court of Session ought to have been permitted to proceed one step further for the purposes of the ulterior object of this summons, without considering the point, whether, under such circumstances, they would, or would not, decern a restitution of conjugal rights. As to the fact of the alleged marriage itself, my opinion goes along with that which has been expressed by the noble Lord who has addressed the House, subject, nevertheless, to some consideration of the terms in which the judgment should be expressed; because nothing can be of greater importance, than that you should take care, that by the terms of the judgment you do not prejudice any future case. I would therefore, with your Lordships' permission, submit to you, that you should take some time to consider in what terms the judgment should be expressed; but with respect to the substance, that this declarator of marriage ought not to be supported, I perfectly agree with my noble friend who has preceded me. June 20. 1828.

Upon a subsequent day Lord Eldon said,—My Lords, It has occurred to me, since I before addressed your Lordships, that I omitted to notice the evidence of the lapidary, White, and that of a witness of the name of Neill. I shall only now say, that after repeatedly considering the effect of the testimony of both those witnesses, and the effect of the observation contained in the different printed memorials and cases, in support of and against their testimony, that testimony might render inaccurate some few expressions to be found in what I had before the honour of stating to your Lordships upon this case; but that testimony does not in any degree, in my judgment, authorize any change of opinion that this reversal should take place.

Lord Chancellor.—My Lords, I rise merely for the purpose of stating, that I entirely concur in the view of this question which has been taken by my noble and learned friends; and I am of opinion most clearly, that the judgment of the Court below in this case ought to be reversed. It certainly is not my intention, and indeed it would ill become me, after the manner in which this question has already been considered, and I may say exhausted, to take up your Lordships' time by travelling over the case; and I will therefore, in a very few words, state the grounds and principles upon which I think this judgment ought to be reversed. In the first place, I beg to look at the charge which is contained in the summons; and without going into detail with respect to the evidence, I will say this, that after carefully considering that evidence, reading it over and over again, I not only am satisfied that the charge contained in the summons is not made out in point of evidence, but I am satisfied it is in all its principles entirely disproved. The next question is this, Did that which took place, that ceremony which is supposed to have taken place at Joseph Robertson's, did it

June 20. 1828. amount to a regular marriage according to the law of Scotland? I am perfectly satisfied, that, according to the law of Scotland, it did not amount to a regular marriage in any representation of the case that has been made. If that be so, in what position do your Lordships stand? You are entitled to look to the evidence as to what did take place at Joseph Robertson's, as far as you can collect it from the witnesses that have been examined: as to that point, you are entitled to look at the conduct of the parties before that meeting, and you are entitled to look at the conduct of the parties subsequently to that meeting; and without going into the detail of the evidence, I will only state shortly, that I am satisfied, not only with reference to what took place before that meeting, but as far as you can collect the facts from what took place at that meeting, and immediately previously to it; above all, from the conduct of the parties subsequently to the meeting, of M'Gregor himself, that there never was at that meeting a full, deliberate, uninfluenced consent of both parties, to enter into the situation and state of marriage,—a full, free, deliberate consent without influence. If I am satisfied that the evidence justifies me in stating this, then I must say, that the judgment of the Court below cannot be sustained; and I must concur with the opinion and judgment of the noble Lords who have preceded me, that that judgment ought to be reversed. With respect to the particular form in which your Lordships should ultimately pronounce the judgment, that will be the subject of future consideration. I agree entirely with the noble Lords who have already expressed their opinion upon this occasion.

Appellant's Authorities.—(Want of Parties.)*—Stair, App. 792.; 4. Ersk. 1. 66.; Campbell, June 19. 1747, (10,456.); Pennycuick and Grinton, Dec. 15. 1752, (12,677.); 4. Stair, 45. 20.; 1. Ersk. 6. 49.; Craig, 2. 18.; Phillip's Evidence, vol. ii. p. 239.—*(Merits.)*—1. Ersk. 6. 10.; 1. Bank. 5. 23.; Cameron, June 29.

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* A search for precedents on the above point (Want of Parties) was made in the Records of the Commissary Court, and the following detail given of the cases thence collected:—

17th March 1741.—MARY GAINER and Children against Captain DALRYMPLE.—Captain James Dalrymple cohabited with Mary Gainer for thirteen years, during which period she had seven children, two of whom died; the remaining five are pursuers in the action, along with their mother. It appears, from the statements of the parties, that their intimacy commenced at Dublin in Ireland, where the pursuer was at the time attending school. She was carried off by the Captain to Kilkenny, where they resided, until he was ordered to Gibraltar, and by his request she followed him thither. He returned to London after several years' absence, and brought the pursuer and her children along with him. In consequence of the pursuer's advancement in pregnancy, and the nature of the season, (it being winter), he left her and the children, and came to Scotland. Some time thereafter, the pursuer and her children arrived at Leith. They were visited by the Captain and some of his friends, when some proposals were talked of for settling the children and the pursuer at Inveresk. Mary Gainer states in the summons, that she had always been acknowledged as the wife of Captain Dalrymple, and went by his name on her arrival at Leith. But he being

1756, (12,680. and Monboddo's Decisions, 351.); Allan, Aug. 11. 1773, (not reported); M'Innes, Dec. 20. 1781, (12,683.); Taylor, Feb. 16. 1786, (12,687.); M'Lauchlan, Dec. 6. 1796, (12,693.); M'Gregor, Nov. 28. 1801, (12,697.); Napier, Nov. 1800, and June 1801, (see Dalrymple v. Dalrymple); Sanctius de June 20. 1828.

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on the eve of marriage with a lady of fortune, on his subsequent visits forbade the pursuer to use his name, and thenceforward no communication passed between them. The pursuer was reduced to extreme penury. In the mean time, Captain Dalrymple was married to Margaret Cunninghame; learning which, the pursuer and her five children went to London for some time; and on her return, as she still assumed the name of the Captain, he brought an action of putting to silence, which was defended by Mary Gainer, on the allegation that she was his lawful wife. During the dependence of the Captain's action, she brought an action of declarator, legitimacy, &c.; in which, after narrating the several facts from which she concluded for declarator of marriage, she adds, that at a time when she 'was utterly incapable to find out where Captain Dalrymple 'was, or to get information what he was about, so that, without her knowledge, or having 'opportunity to prevent it, he took upon him to accomplish, as she afterwards learned, 'on the 24th or 25th days of August 1737, a marriage with the said Margaret Cun-'ninghame.' The execution of citation upon the summons does not bear that Margaret Cunninghame was made a party, nor did she of her own accord appear in the cause. The interlocutors of the Commissaries assoilzied Captain Dalrymple from the conclusions declaratory of marriage, and in the action of putting to silence decerned against Mary Gainer.

23d *October* 1754.—ISOBELLA REIKIE against ALEXANDER WILSON.—In September 1750, Reikie and Wilson were married in Edinburgh by a minister before witnesses, and cohabited as man and wife till the month of March following, when they separated. On the 30th August 1754, Wilson subscribed an acknowledgment, professing that Anna Grahame, with whom he then lived, was his 'lawful married spouse.' Founding upon this and other acts of adulterous intercourse, Isobella Reikie brought an action of divorce before the Commissaries, who, upon the proof adduced, decerned against the defender in the divorce. Anna Grahame was not made a party, nor does she appear in any character in the process.

13th *October* 1756.—ANNE MORRISON against WILLIAM DUNLOP.—William Dunlop, chapman and burgess in Glasgow, was privately married to Mary Boyd in the month of September, or some time in the months of June, July, August, or October 1753. He afterwards, on the 10th or 12th November in the same year, married the pursuer, Anne Morrison, in a similar irregular manner. The procurator-fiscal for the town of Glasgow convened the several parties, viz. Boyd, Dunlop, and Morrison, before the Magistrates, on the 26th of November, in virtue of the 34. Charles II., when Dunlop, on his own confession, was convicted of being privately married to Anne Morrison, and fined and amerciated, &c.; and in respect of his denial of being married to Mary Boyd, which she affirmed he was, ordered to be imprisoned on a charge of bigamy, until liberated in due course of law. On the 24th January 1756, Anne Morrison raised her action of declarator of nullity of marriage against William Dunlop, referring to and founding in her libel on the proceedings at the instance of the procurator-fiscal, and the declarations of the parties under these proceedings, extracts of which were produced in process; and also upon marriage lines, severally given to Mary Boyd and Anne Morrison. The summons was only served on Dunlop: his wife, Mary Boyd, was not made a party defender, but was adduced as a witness for the pursuer. The Commissaries declared Anne Morrison's marriage null ab initio.

June 20. 1828. Matrimonio; Haggard's Reports, vol. ii. p. 290.; Lord Hailes; Tait on Evidence; Forbes, July 12. 1709, (16,718.); Murray, June 1730, (16,741.)

Respondent's Authorities.—(Want of Parties.)—Aitken, June 16. 1824, (2. Shaw's

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18*th August* 1672.—CHARLOTT ARMSTRONG and Daughter against JOHN ELLIOT.—Charlott Armstrong raised an action of declarator of marriage, legitimacy, and divorce, against John Elliot, on 31st March 1760, in which she states, that a private marriage was contracted between her and John Elliot in the month of March 1758, and that they thereafter lived and cohabited together as husband and wife for several days, and of which marriage a female child was procreated. It then sets forth, that he has deserted her, and for several months past has cohabited at bed and board with a woman, known not to the pursuer Charlott Armstrong. While this action was in dependence, and upon the 17th May 1760, Janet Boston brought another declarator of marriage, adherence, and legitimacy, against the said John Elliot, alleging that a marriage, of which a male child was born, had been contracted between the parties on the 7th September 1757, and concluding for declarator of the said marriage, &c. Her summons states, 'that Charlott Armstrong, daughter of John Armstrong in Sorlie, pretends to be wife 'to the said John Elliot, as having been married posterior to the complainer's marriage, 'though she could not lawfully be so.' In the execution of citation, Janet Boston did not call Charlott Armstrong; but before Elliot had given in defences to Armstrong's action, Janet Boston presented a supplementary petition to the Commissaries, stating, 'That in the month of September 1757 she was privately married to John Elliot, 'younger of Halgreen, who was her father's clerk. For some family reasons the mar-'riage was not made public till after Mr Boston's death, but it was known to several 'persons, and in consequence of it the petitioner was delivered of a son at Edinburgh 'on the 18th July 1758; and the petitioner and the said John Elliot have lived happily 'together as man and wife; and she has raised before your Lordships a process for 'declaring her marriage with the said John Elliot, and the legitimacy of the child born 'of the marriage,—as the libelled summons, and execution thereof produced, bears: 'That the petitioner understands one Charlott Armstrong has raised a process for de-'claring her marriage with the said John Elliot, and most injuriously also concluding for 'a divorce for adultery with the petitioner. The petitioner's interest must appear ob-'vious to the said Commissaries in many lights, and therefore the petitioner takes leave 'to state some few things for your Lordships' consideration. In the first place, The 'pursuer (Armstrong) states her marriage with the defender to have been on the 7th 'March 1758, according to lines pretended to be signed by him, though the petitioner 'is informed by her husband this is a fiction; yet supposing it were true such a decla-'ration had been signed, it could have no manner of effect, because, unluckily for the 'pursuer, she has happened to make it posterior to the petitioner's marriage by several 'months; 2d, That any intercourse and promise that may have passed between them 'even prior to the defender's marriage with the petitioner, yet this marriage must be 'considered and held in law to be a medium impedimentum or bar against the defen-'der's obligation to the pursuer ever having any effect other than damages for such 'injuries as the pursuer can make appear have been done her.' The petition prays, that it may 'therefore please the said Commissaries to conjoin the processes, and either 'stay the process of Charlott Armstrong until the diets of compearance in the complai-'ner's summons has expired, which is not till 11th June next, or to dispense with the 'inducise, and ordain both processes forthwith to be insisted in, and allow the defender 'John Elliot to give in defences in both processes, and assign him a short day to that 'effect.' Charlott Armstrong gave in answers to this petition. Upon considering which, and answers, with the two processes referred to, the Commissaries, on the 26th

Appeal Cases, No. 51.); Chapman and Lindsay, Feb. 23. 1826, (4. Shaw and Dunlop, No. 330.); Dalziel, July 10. 1790, (16,780.); Hargrave's Law Tracts; case of Duchess of Queensberry; Scaccia de Sententiis; Heraldus de Rebus Judi- June 20. 1828.

May 1760, conjoined the two processes, and appointed the defender to give in his defences to both processes. Both parties went to proof, and the Commissaries found facts and circumstances proven to infer marriage between Charlott Armstrong and John Elliot previous to any pretended marriage with Janet Boston; and decerned in the action at the instance of the said Charlott Armstrong for marriage, legitimacy, &c.

13th December 1777.—JOHN CAIRNS against MARGARET FERGUSON.—The summons states, that after the parties were married, Margaret Ferguson left the pursuer, and contracted a marriage with a James Surrel, and went to London. The defender was summoned as forth of Scotland, and the divorce passed in absence.

24th June 1780.—HELEN STEWART against JOHN M'INROY.—The libel of declarator of marriage states she had been married to M'Inroy in 1763; that he has deserted her, and married another woman of the name of Jean Ralston or Mrs Gourlay, with whom he cohabited for some time in Glasgow, and afterwards in Greenock, before he sailed on his present voyage to the East Indies. That the defender lived with a woman not the pursuer; no evidence of the fact appears in the proof. The defender was abroad when cited, and the proceedings went on in his absence. Jean Ralston was not called, nor did she appear.

28th September 1780—JANET SPENCE against WILLIAM EDMOND or HADMOND.—The pursuer alleges in the summons, that the defender lived and cohabited with a woman named Elizabeth Moubray, who had children by him, and was sometimes passed as his wife. The proof only goes into the inquiry of adultery. The defender did not appear.

3d July 1780.—DONALD M'NAIR against ISOBEL FORBES.—This case is exactly similar in its circumstances to the one immediately preceding; the second marriage is a mere allegation, of which no proof was taken. The decree (of divorce) passed in absence.

2d June 1790.—ELEONORA HANNAY against JOHN DALZIELL.—In a summons of declarator of marriage, legitimacy, aliment, damages, &c. the pursuer alleges, that, in consequence of a reciprocal attachment between her and the defender, they contracted a marriage, of which a child was procreated, and cohabited privately as husband and wife during the months of January and February 1787; that the correspondence was discontinued by John Dalziell, who thereafter attached himself to a Miss Kelly, who came to reside in the neighbourhood of the parties; and that on being required by the relations of the pursuer to take her the pursuer home, the said John Dalziell alleged, that he had been deceived into a matrimonial engagement with Miss Kelly, and could not acknowledge the pursuer as his wife. In the defences given in for John Dalziell, he contended that the libel concluded for marriage on the ground of a promise and subsequent copula. He denied the marriage, and urged that the promise could only be proved by his writ or oath, which the Commissaries found. In this action, Miss Kelly was not called. The defender was examined judicially on the subject of the libel: in his declaration he continues to deny the libel, and 'declares, that he never expressed a love 'and regard for the pursuer, either to herself or to any other person whatever; and that 'he never concealed his attachment for the lady to whom he is now married, and that 'she was the sole object of his affections; and these professions were made and publicly

June 29. 1828. cutis; Mauritius de Jure Interventionis; Dalrymple, Dodson's Report.—(*Mutuis.*) —1. Ersk. 6. 10.; M'Innes, Dec. 29. 1781, (12,682.); Taylor, Feb. 16. 1786, (12,687.); M'Lauchlan, Dec. 6. 1796, (12,693.); M'Gregor, Nov. 28. 1801,

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'known in the whole town of Wigton, for two years before that event.' In the course of the litigation the pursuer gave in a minute, referring the promise of marriage to the oath of the defender; but before the Commissaries had advised this minute, the pursuer gave notice to the Commissaries, that being satisfied that the defender would defeat her claim from want of evidence, she had married Alexander Turnbull, mariner in Wigton, and restricted her libel to the alternative conclusion of damages and aliment for her child. The husband of the pursuer was, on the motion of the defender, sisted for his interest; and the Commissaries assoilzied from the conclusions declaratory of marriage, &c., and proceeded to consider the question of damages.

28*th December* 1791, 4*th January* 1792.—JAMES DALRYMPLE against SUSANNAH CUNNINGHAM.—The summons of divorce states, that these parties were married in 1772, and had three children of their marriage; that they lived separate after November 1772; that after that period the defender had associated and lived with a person named Mills, a comedian deceased, whose name she assumed, and after his death wore mourning as his widow; and that at the date of the summons she lived with Fingy, a comedian, and assumed his name. The defender was summoned at the pier and shore of Leith. No opposition was made for the defender.

8*th August* 1792.—JEAN LILLIE against JAMES HOGG.—The summons (of divorce) states, that the parties were married in December 1776, and lived together for a number of years in different parts of Scotland; that the defender had gone to England in 1784, and in the village of Adstone, Cumberland, cohabited for several years thereafter with a Mary Middlemist, in the character of husband and wife. The defender was summoned at the pier and shore of Leith, &c. No appearance was made.

24*th October* 1792.—Mrs JANET ALLISON against CAPTAIN BAILLIE.—The summons (of divorce) states, that the parties were married in 1780, and lived together as husband and wife; that in 1789 the defender had given up and totally alienated his affections from the pursuer, and on his passage to the East Indies he pretended to contract a marriage with Miss King, and lived with her at bed and board in the East Indies, &c. The defender was summoned as forth of Scotland. No appearance was made for him.

22*d February* 1793.—MARY CHISHOLM against DANIEL M'INTOSH.—The summons (declarator of nullity of marriage) proceeds on an allegation that the defender and pursuer were married on the 24th April 1789, but that he had been previously married to a Christian Nicol, who was still in life. The defender was summoned as forth of Scotland, and no appearance was made.

12*th June* 1793.—MARGARET LAW against ALEXANDER RULE.—In the summons (of divorce) the pursuer alleges, that the parties were married on the 18th July 1787; that in 1789 the defender went out to Gibraltar, carrying with him a woman named Mary Young, whom he pretended to marry, and who lived and cohabited with him at Gibraltar as his wife. The defender was summoned as forth of Scotland, and no appearance was made in the action.

27*th February* 1795.—CATHERINE JOHNSTONE against THOMAS WRIGHT.—The

(12,667.); Napier, Nov. 1800, and June 1801, (see Dalrymple v. Dalrymple); M'Kenzie, March 8. 1810, (Fac. Coll.); Niven, (Fountainhall, vol. i. p. 501.); Tait on Evidence; Barber, July 1732, (16,742.); Young, Dec. 8. 1738, (16,743.); June 20. 1828.

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summons (of divorce) stated, that marriage was contracted between the parties in January 1787; that the defender, for three years prior to the date of the action, February 1793, had contracted an adulterous connexion with Sarah Tatersballs, and, pretending a marriage, went with her to America, where they lived as man and wife. The defender was summoned as forth of Scotland, and no appearance made.

24th August 1796.—PIRRIE against LUNAN.—This case (of divorce) is in its circumstances similar to the above. The defender is said to be residing with another woman in England. He is summoned as forth of Scotland. No appearance was made for him in the action.

19th July 1805.—ANN JUNIOR and Children against HUGH ROSS.—The pursuer states in her libel, (declarator of marriage, adherence, and aliment), that she had raised an action for aliment against Hugh Ross, but he having denied his marriage with the pursuer, and alleged that he had since married a woman of the name of Noble, with whom he cohabited, the Court of Session had sisted that process, until the marriage of the pursuer and Hugh Ross should be established in the proper Court. She therefore had brought the present action to have the marriage declared. Noble was not called. The defender Ross was summoned, but failed to appear. The Commissaries allowed the pursuer a proof of her marriage: a commission was taken to examine witnesses at Inverness, &c., by the report of which it was established, that the pursuer and defender were married at Inverness about thirteen years previous to the date of the action, and the Commissaries decerned accordingly.

26th May, and 1st June 1810.—BARBARA LUTIT against GEORGE NEILL.—In the summons (declarator of marriage, with an alternative conclusion for damages), the pursuer narrates the particular circumstances upon which she founds her marriage. In the defences the defender admits that he had kept the pursuer as his mistress for some time, and denies any marriage ever having existed between them; and that lately he was publicly married to the daughter of Mr George Gibson, a respectable merchant in the town of Haddington; that they had been married by Dr Lorimer, one of the established clergymen of the town, after regular proclamation of banns, and their marriage was publicly announced in the newspapers. The pursuer did not deny her knowledge of this fact. The second wife was not made a party. The pursuer's proof went so far as to establish that the pursuer and defender had been addressed in presence of each other as married persons, and paid the usual compliments of newly married people, without any demur on the part of the defender. On going for the midwife he spoke to a person in the hearing of others, saying, Mrs Neill was very ill, &c. &c. The Commissaries assoilzied the defender.

12th July 1811.—ROBERT MONCREIFF against ELIZABETH KAY.—An action of declarator of nullity of marriage, founded upon the allegation that the defender was, at the time of contracting the marriage, married to a William Lyle, boot-maker, residing in London. The allegation was proved, and the Commissaries decerned.

15th and 16th August 1811.—JEAN RAMAGE against JAMES M'INTOSH.—The libel (declarator of nullity of marriage) states, that she was married to the defender by Mr Robertson in March 1811; and that after this marriage she discovered that he was

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Haggard's Reports; Hailes's Canon; Hume on Crimes, vol. i. 462.; vol. ii. 329.; Mogg, Addam's Reports, 2.; Fletcher, Coxe's Reports; Hailes's Reports, vol. i. 561.; Elchies, No. 7. voce Proof.

MONCREIFF, WEBSTER, and THOMPSON—ALEX. MUNDELL,—Solicitors.

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married to another woman named , still alive. The fact being proved, the Commissaries decerned.

1819—1824.—Mrs JOANNA GORDON or DALRYMPLE, against JOHN WILLIAM HENRY DALRYMPLE, Esq.—After the pursuer succeeded in her action of declarator of marriage against Mr Dalrymple, she brought an action of divorce against him, on the ground of adultery with Miss Laura Manners, sister of the late Duchess of St Albans, with whom the defender had also contracted marriage, &c. &c. On the 26th November 1819 the Commissaries found generally facts and circumstances to warrant a divorce. The pursuer then petitioned the Commissaries, that the name of Miss Manners should be inserted as an adulteress. 10th December 1819, the Commissaries did so. Appearance was then made for Miss Manners, and the Commissaries allowed her petition to be answered. In her petition she contended, that as soon as she became acquainted with the finding of the Court declaring Mr Dalrymple married to the pursuer, she ceased to cohabit with him; that there was therefore not a guilty knowledge; and that she was innocent of the crime of adultery; and that the charge in the interlocutor upon her reputation would materially affect her status in society: that she ought not to be found guilty of a crime by the decision in a case to which she was no party, without being permitted to state any defence, and upon evidence taken without her knowledge, and without being allowed to bring forward such evidence as, if she had been a party, she might have done.

1*st December* 1810.—ROXBURGH against THOMSON, TEMPLETON against THOMSON.—Each of the pursuers claimed Thomson as her husband. Both actions of declarator of marriage were directed exclusively against Thomson: No other person was cited. Roxburgh voluntarily entered appearance in Templeton's action; in favour of whom ultimately decree was pronounced.

6*th July* 1827.—DEAS against HAMILTON.—Deas stated in her summons, that she was married to Hamilton in 1788, and concluded for declarator of marriage and aliment. He denied the marriage, and after noticing the pursuer's silence for thirty-seven years, he proceeds, 'He has been married to his present wife (Jean Stevenson) for upwards of thirty-three years, and has a family who have arrived at manhood, and one of them is married and has children.' Jean Stevenson was not called, nor did she make any appearance in the action. The Commissaries assoilzied, on the ground of the pursuer having failed to adduce legal evidence of her marriage.

12*th May* 1827.—LEES against HAIG.—Here Lees stated in her summons that she had been married to Haig, and that they cohabited together as man and wife from the year 1821 to 1823, when he deserted her, and concluded for declarator of marriage and aliment. Haig denied marriage, and stated that he has since been lawfully married to Miss Phillip. The pursuer replied, that 'she does not know whether the forms of the marriage ceremony took place between the defender and Miss Phillip, but be that as it may, she knows that the pursuer is the defender's lawful wife.' The second wife was not called, nor did she appear. The defender was assoilzied.

A number of other cases were referred to, but merely their dates and names given.

INCORPORATION of FLESHERS of GLASGOW, Appellants. No. 8.
Solicitor-General Tindal—Fullerton.

CHRISTIAN NELSON or SCOTLAND, Respondent.
Keay—T. H. Miller.

Et e Contra.

Incorporation.—An incorporation having by its by-laws fixed certain rates of annuity payable to different classes of decayed members and widows;—Found, (affirming the judgment of the Court of Session), That a widow was entitled to enforce, in a court of law, her claim as a matter of right, and was not bound to accept the allowance as a payment depending on the pleasure of the incorporation.

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1st DIVISION.
Lord M'Kenzie.

JAMES SCOTLAND, a vintner and chaise-hirer in Glasgow, married Christian Nelson, daughter of a flesher, who had been a member of the incorporation of fleshers in that city. By the rules of the incorporation, the sons or sons-in-law of a member were entitled to be admitted on more favourable terms than others; and various provisions had been made for providing certain sums to decayed members, or their widows, subject 'to be diminished or augmented by the trade.' On the 21st of October 1807 the following resolution was agreed to, and recorded in the books of the incorporation:—'At Glasgow, 21st 'October 1807.—The deacon and masters being met, proposed 'to the consideration of the trade an increase of the annual 'allowance to decayed members, and widows of members, in 'consideration of the high advance of the necessaries of life, and 'the change of circumstances since the last allowances were 'fixed by the trade. Thereafter, the ordinary members being 'called in, the whole being warned to this meeting, as verified 'by the trade's officer, the whole meeting took into considera-'tion the proposition of raising the allowances to the trade's 'poor. It was carried, and is now enacted, that the annual 'allowances to reduced members and widows, to commence at 'Martinmas next, shall in future be to members who have 'carried on the flesher trade for five years or upwards, L.12 'sterling; 2d, To members who have not carried on trade that 'time, L.6. 3s. sterling; to pendicles,† L.3 sterling: and to

* This case was decided on the 4th, but was accidentally omitted in its proper place.

† Persons who were members, but did not exercise the trade of fleshers.

June 20. 1828. 'widows of the first class, L. 8; to widows of the second class, 'L. 5; and widows of the pendicles, or third class, L. 3 sterling; 'but with power to the master-court to increase their allowances 'as circumstances shall require, or diminish the same, if the 'funds of the trade are to be encroached on, or will not afford 'these allowances.' On the 16th September 1809 Scotland entered with the incorporation, and paid L.4. 8s. 10½d. to the funds; and thereafter, and till his death in December 1819, the annual contribution of one shilling. Soon thereafter his widow, the respondent, raised an action before the Magistrates of Glasgow against the incorporation, in the summons of which she set forth, 'That the pursuer's late husband was, at the date of, and 'for a number of years previous to his death, which took place 'upon the 31st day of December 1819, a member of the said 'incorporation of fleshers, and made regular payment of the 'original entry-money, as well as of the yearly contributions to-'wards their funds due by him as such: That the pursuer, as 'his widow, is now entitled to claim from the funds of said in-'corporation a certain yearly allowance or annuity, besides a 'certain sum towards defraying her said husband's funeral 'expenses; but as the said defenders have refused to give her 'the necessary information, by allowing her inspection of the 'regulations of the fund or otherwise, she is at present unable 'to condescend with accuracy upon the precise amount to which 'she is entitled: That from the information, however, which 'the pursuer has been able to procure from several widows in a 'similar situation with herself, and who at present receive an 'allowance from said incorporation, she has the best reason to 'believe that she is entitled to claim from the funds of the said 'incorporation, as the widow of one of its members, the yearly 'sum of L.8 sterling, besides the sum of L. 3 sterling towards 'defraying the funeral expenses of her late husband.' She therefore concluded for payment of the yearly sum of 'L.8 'sterling, or such other sum, more or less, as shall be found, 'upon exhibition and inspection of the regulations anent the 'allowance to be made to the widows of deceased members of 'said incorporation, to be the amount to which the pursuer is 'entitled, payable the said annuity quarterly.' In defence the incorporation stated, 1. That the fund which had been provided was intended for distribution in charity among the poor widows of members; that a share of it could not be claimed as a matter of right; that they were entitled to exercise their discretion in distributing it; and that, although they had been willing to give

the respondent a certain allowance in charity, yet they must resist any demand on the footing of her having an absolute right to claim any sum from them, and could not be controlled by the discretion of a court of law: And, 2. That, supposing she could make a claim as a matter of right, then they averred, that her husband had not carried on business as a flesher for five years prior to his death, and therefore she was not entitled to a larger annuity than L. 5. The magistrates allowed her a proof 'that by the established rules of the corporation, or by 'agreement express or implied with the pursuer's late husband, 'the defenders are legally bound to pay the pursuer the annuity 'and funeral expenses claimed in the libel, or to any greater 'amount than the rates offered in the answers.' On advising the proof they pronounced this judgment:—'Find it proved, 'that, agreeably to by-laws or standing regulations of the cor-'poration, the defenders have been in the practice, for upwards 'of forty years, of allowing certain rates of aliment to the widows 'of deceased freemen; and find, that corporations of tradesmen 'in royal burghs are subject to the controul of the competent 'Courts, with regard to the application of their funds to the 'legitimate purposes to which these funds are destined; Finlay 'v. Newbigging, 15th January 1793. But before determining 'whether the rate of aliment demanded by the pursuer in the 'present case can be competently enforced by a court of law as 'a matter of right, or whether the allowance of different rates of 'aliment to the widows of freemen by the corporation be not a 'matter of internal discretionary arrangement, with which it is 'not competent for courts of law to interfere, agreeably to the 'principle recognized in the case of Paterson v. the Corporation 'of Skinners in Edinburgh, 10th February 1803, appoint the 'pursuer to shew, in a note annexed to her last pleading, first, 'That her deceased husband actually exercised the trade of a 'flesher, or otherwise belonged to the description of members of 'the corporation, to whose widows the rate of aliment claimed 'by the pursuer was usually allowed, according to the last stand-'ing resolution of the corporation on the subject: secondly, That 'the entry-money and subsequent stated contributions made by 'her late husband to the funds of the corporation, were so made 'upon the condition, express or implied, as appearing from the 'minutes of the corporation or otherwise, of his widow receiving 'a certain rate of aliment.' Thereafter they pronounced as follows:—'Find, That from the minutes of the corporation, and 'other evidence adduced, the pursuer's claim to aliment appears

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June 20. 1828. 'to rest on the contract of parties, express or implied, and not 'to fall under the rule recognized in the case of Paterson v. the 'Corporation of Skinners of Edinburgh, 10th of February 1803, 'in which it does not appear that the deceased husband of the 'claimant had made any payment at the date of his entry, or 'any subsequent quarterly payments, on the condition or footing, 'express or implied, of his widow receiving a corresponding 'aliment. But before pronouncing any judgment on this point, 'allow the pursuer to adduce any farther proof she may have, 'that her deceased husband actually belonged to the description 'of members of the corporation to whose widows the rate of ali- 'ment claimed by the pursuer was usually allowed, according to 'the last standing resolution of the corporation on the subject.' With this interlocutor this note was issued:—'There is nothing 'in the original constitution of corporations, instituted chiefly for 'the promotion of trade and manufactures, to prevent them from 'engrafting upon it a plan for the support of their decayed mem- 'bers and widows, or from raising funds for that purpose, by con- 'tributions at the entry of members, or at subsequent stated 'periods, of which funds the corporation may have the distribu- 'tion, either entirely discretionary, if arranged upon that footing, 'or according to certain rules or rates, upon the principle of ex- 'press or implied contract with the individual members. From 'their minutes the Corporation of Fleshers of Glasgow appear to 'have adopted the latter mode of arrangement; and it is the 'duty of a court of law to give effect to the implied contract, 'when called upon to do so.' On advising the additional proof, the Magistrates found it proved, that Scotland had exercised the trade of a flesher for the period requisite to entitle his widow to the annuity of L. 8, and therefore decerned in terms of the libel. The incorporation having advocated, the Lord Ordinary assoilzied them, and observed in a note: 'The case of Paterson, '10th February 1803, and the want of contrary decisions on a 'point so practical, seems to the Lord Ordinary to establish 'at least this much, that when a corporation of this kind has 'fairly exercised its discretion on a claim of charitable relief by 'a member or member's widow, that is all that can be legally 'demanded; and courts of law are not bound or at liberty to 'review the discretion of the corporation by the discretion of 'the court. Now, in this case, the Lord Ordinary sees no 'room for doubt that the complainers did fairly exercise their 'discretion on the respondent's claim, and gave her such allow- 'ance as in their judgment was fit; and if there was error, from

'their holding that the respondent's late husband was not five 'years in trade as a flesher before his death, it was, at least, 'error in a very doubtful matter.' The respondent having reclaimed to the Inner-House, and the defenders having offered to continue the modified aliment of L. 5 in time to come, on the same footing and in the same manner as payments are made to other widows of the incorporation, the Court, on the 25th January 1825, of consent, decerned in terms of the minute, but quoad ultra adhered, and found no expenses due. She again reclaimed; and, when the case came to be advised, the Court was of opinion that she was entitled to the allowance provided to widows of the class to which her deceased husband had belonged, and that she should have at least the expenses incurred in discussing the point of right; and accordingly, on the 2d February 1826, their Lordships, 'in respect it is not denied that 'the pursuer, being widow of a member of the incorporation, 'was in indigent circumstances, she, in virtue of the subsisting 'regulations, was entitled to the annual allowance provided to 'widows of the class to which her deceased husband belonged, 'subject always to such variations as might become necessary 'from the inadequacy of the funds in regard to the provisions of 'the widows of the incorporation generally,' altered the interlocutor of the Lord Ordinary,—in so far varied their own interlocutor,—decerned for the payment of the annual allowance of L. 5 sterling,—and refused the desire of the petition quoad ultra, except as to expenses, which afterwards they allowed to the extent of what were incurred in the discussion of the question of right.* June 20. 1828.

The incorporation appealed, and the respondent cross appealed.

Appellants (in chief appeal).—As long as the respondent's conduct is reputable, and the funds of the incorporation are adequate, the allowance will be given to her, but not as a claim of debt independent of the controul or discretion of the incorporation. If she had such a right, so have others, and the funds would speedily be exhausted. There is no doubt that an incorporation will not be permitted to misapply the funds by consuming them on any other than corporate objects; but still the widows of members have no legal right to demand payment of the rates which the incorporation may see fit to allow. The respondent's case was not taken from under this rule by any special contract made with her husband when he entered. It is

* 4. Shaw and Dunlop, No. 275.

June 20. 1828. quite unreasonable to suppose that the incorporation would, for such an inadequate sum paid in by Scotland, have sold his widow an annuity of L. 5 per annum, which she could claim as a matter of right. The incorporation have no separate funds for the poor or decayed, but pay from the common stock what its amount may allow, and the cases of want may require. No doubt an incorporation may constitute themselves into a benefit society, and thus each member or his widow gain ex contractu a legal right to the annuities fixed to their respective classes or situations; but this was not the case with the appellants. Over whatever they have given they have exercised a discretionary power; and although a scale of allowances for decayed members and widows is entered in the incorporation minutes, and approved of, the incorporation never thought that thereby they had given the claimants a right to demand their respective rates, or had lost the power to alter, diminish, or increase the amount. The books afford innumerable instances of the exercise of this discretionary power, the inquiry being invariably as to the fact of the claimant's poverty, the character of the party, and the state of the incorporation funds. To the cross appeal the answer is sufficient, that the proof led shews that the pursuer's husband did not truly and bona fide carry on business as a flesher for five years before his death.

Respondent (in chief appeal).—Incorporations of tradesmen are very ancient in Scotland. Their first object was the protection of trade; but the alimenting of widows of members, and members themselves who were in poverty, was also a most desirable end. Being, however, a secondary object, the amount given might at first be purely discretionary; but when the funds acquired a consistence and stability, so did the rates. This charitable purpose is mentioned in the fleshers' charter or seal of cause, and long since fixed by deliberate resolutions. There remained a discretionary power of protecting the principal of the funds from being encroached upon,—of giving, if the funds afforded, or the times required, an increased allowance, or administering further relief in clamant cases; but the rates fixed could not, except in the single instance reserved, (and that is not pretended to have occurred), be lessened. On the contrary, every member and widow entitled to aid have received it precisely agreeably to the scale that applied to them. As to the comparison of the amount of the allowance with the sum paid in, it is obvious that in many individual cases there may be a great difference. But to judge of the matter correctly, the aggregate of

payments and receipts is to be looked to. The danger and result, however, described by the appellants, are quite fanciful. The respondent's husband took the scale as he found it; and under the rates of payment therein arranged, the funds of the incorporation have been increasing. Such being the case, the respondent is clearly entitled also to have her legal right declared by the Court. As to the length of time her husband followed the profession of flesher, the evidence is decidedly in favour of the space of five years, which lets her in to the highest rate; and therefore she is entitled to full costs. June 20. 1828.

The House of Lords 'ordered and adjudged, that the interlocutors complained of be affirmed, and the appeals be dismissed.'

Lord Chancellor.—My Lords, In this case the Incorporation of the Fleshers of Glasgow are the appellants, and Mrs Christian Nelson or Scotland is the respondent. This case was heard at your Lordships' Bar a short time since. It is a claim preferred by the pursuer to an annuity of L. 8 a-year, as the widow of Mr Scotland, who was a member of this community, and carried on the business of a flesher, as it is contended, for a period of more than five years,—five years or upwards. The subject in contest is an annuity of L. 8 a-year during the life of this widow; and I apprehend that, in the final winding up of this cause, it will be found that the expenses that have been incurred exceed, in a twenty-fold degree, the amount of the subject in contest. It is now before your Lordships, and it is for your Lordships finally to decide it.

This corporation, as it appears, has been in the habit for a long series of years of making allowances to decayed members, and of making allowance also to widows of indigent members of the community, under the name of aliment, according to the practice which has prevailed in different institutions and corporations of this kind throughout Scotland. At an early period it appears that these payments were arbitrary. Each individual case came before the members of the corporation; the case was investigated, and they gave an allowance, according to their judgment of the nature of the claim; and it appears also, that at different periods they exercised the power of discontinuing those allowances. Alterations, however, took place, to which it is unnecessary for me particularly to advert; because I will call your Lordships' attention to the change which took place in the year 1807. In the year 1807 a proposal was made to revise the laws of this corporation; a committee was appointed for that purpose; that committee was sitting for a considerable time, and made their report to the whole body.

June 20. 1828. Upon that report being made to the body, they came to an agreement among themselves, in the month of October 1807, by which they finally regulated these matters; and according to the agreement, as far as relates to the present question, at that time entered into, it was arranged between them, that the widow of a member of the corporation, who had carried on the business for a period of five years and upwards, should be entitled to a fixed payment of L 8. a-year; and that in the case of a widow of a member of the corporation who had not carried on the business so long as five years, the sum allowed should be L. 5 a-year; and there was this clause,—that in the event of the funds of the corporation not being sufficient to meet these payments, the master-court should have the power of reducing them, vested in the master-court in that event, and in that event only.

After this arrangement had been made in the year 1807, namely in the year I think 1809, James Scotland became a member of the society. He had married a person of the name of Nelson, the daughter of a freeman. He became entitled, therefore, upon making a certain payment to the funds of the society, to take up his freedom. He accordingly took up his freedom in the year 1809, continued a member of the society to the period of his death in the year 1819, and made a small annual payment every year, that was incident to his situation as a freeman. He became therefore a party to this agreement. He became entitled to the benefit of this arrangement; and in consequence, in the year 1819, upon his death, his widow claimed a payment of L. 8 a-year, on the ground that her husband had carried on the business of a flesher for a period of five years and upwards.

Now, my Lords, upon the agitation of this question, two points have been submitted to the consideration of the various tribunals before whom this question has been considered. One point, and a material point for consideration, is, as to whether or not this right can be enforced in a court of justice? Another question, and that is a question of fact, is, as to whether she is entitled to the L. 5 annuity, or to the annuity of L. 8 a-year? With respect to the first and material point for consideration, it is to be recollected, that this was an agreement entered into between the members of this society; that after that agreement had been entered into, Mr Scotland became a member of the Society—made his payments as a member of the society—continued a member of the society to the time of his death—and became therefore a party to the agreement, and entitled to all the benefits of the agreement for himself, and for his widow in the event of her surviving.

My Lords,—There has been no dispute in the progress of this cause as to the poverty of the claimant, as to her being in indigent circumstances, so as to entitle her to the benefit of this regulation. There has been no impeachment whatever of her moral conduct. It is admitted that she comes fairly within the rule; and the question is, whether, coming fairly within the rule, there being no exception on the

ground of her not being indigent, there being no exception whatever to her on account of any impropriety of conduct, this society have a right arbitrarily to withhold this payment—because they can arbitrarily withhold this payment, unless there is a means of enforcing the payment through the medium of a court of justice? I apprehend this is to be considered as an agreement and an arrangement between this society and every individual member of the society, and, so long as this arrangement continues in force, every member has a right to the benefit of it; and if that benefit is attempted to be withheld from him, I apprehend, under such circumstances, he is entitled to come to a court of justice for the purpose of claiming redress. June 20. 1828.

My Lords,—This was the view of the case taken by the Court of Session, and accordingly they pronounced the interlocutor against which this appeal has been preferred. The interlocutor is in these terms, drawn up after much consideration and much attention to the subject:—(His Lordship read the interlocutor.) The Court, therefore, considering that there was no dispute, and there had been no controversy in the progress of the cause in respect of the indigent state of this woman—that there was no objection whatever to her moral character and conduct—felt that she was entitled to the benefit of this agreement; that that being withheld from her, she was entitled, as a matter of right, to come to a court of justice and to seek redress.

I think your Lordships will be of opinion that this judgment ought to be affirmed. The only argument that was pressed against it, in point of authority, arose out of the case of Paterson against the Corporation of Skinners of Edinburgh; but that case has no reference whatever to that before your Lordships. It is true that was a case of aliment; but in the case of Paterson against the Corporation of Skinners, it appears, according to the facts of that case, that in the regulations which existed for the original constitution of that corporation, each individual case was considered by itself; that the claimant preferred her claim to the corporation—they considered the nature of her claim, and made her such allowance as they thought proper; and it appeared that they were in the habit, from time to time, of withdrawing those allowances, according to their own discretion and their sense of the propriety of the act. It is perfectly clear, therefore, that that case has no resemblance to a case like the present, where an arrangement was entered into with respect to a fixed amount, appropriated according to a certain course of payment, to which all the members of the corporation were parties. I think your Lordships will be of opinion, that the case of Paterson against the Incorporation of Skinners is no authority for this opposition, and that the Court of Session distinguishing that from the case now before your Lordships, that judgment was, in respect to the point to which I have adverted, perfectly correct.

My Lords,—With respect to the question of fact, as to whether the woman is entitled to the five or the eight pounds, I will not trouble your Lordships by going through the detail of the evidence. I will

June 20. 1828. only state generally to your Lordships, that after having looked with as much attention as I can into the subject, it appears to me that it is not made out in a manner satisfactory to my mind; at least it is not made out and established in evidence, that her husband carried on the business of a flesher for a period of five years and upwards; and that not being made out satisfactorily in point of evidence, the consequence is, that she cannot be entitled to claim more than the sum of five pounds a-year. I have read through the judgments of the Court of Session with respect to the question of fact: they came to the same conclusion after considering it most fully. I think their judgment in this respect is perfectly correct, and I should recommend to your Lordships, therefore, to confirm that part of the case.

With respect to the costs, the manner in which the costs have been arranged appears to me also to be fair and equitable—that part of the costs that arose out of the discussion of the question of right has been allowed to the widow, but she has not been considered by the Court below as entitled to those costs resulting out of the investigation of the question of fact, the decision of the fact having been against her; and I think your Lordships will be of opinion that they ought to be disallowed, provided your Lordships are of opinion the judgment of the Court on the other points ought to be affirmed. I should submit to your Lordships, therefore, upon the whole case, that the final judgment of the Court of Session below should be affirmed, and both appeals dismissed. There is an original appeal by the corporation, and there is a cross appeal by the widow; the decision, therefore, I should recommend to your Lordships is, to dismiss both appeals, and I think upon the whole it will be better that there should be costs on neither side.

SPOTTISWOODE and ROBERTSON—MONCREIFF, WEBSTER, and THOMPSON,—Solicitors.

No. 9. ALBION FIRE AND LIFE INSURANCE COMPANY, Appellants. *Solicitor-General Tindal—Scarlett.*

WILLIAM MILLS, and Others, Respondents.—*Adam—Brougham.*

Insurance—Stat. 6. *Geo. I. c.* 18.—An English Insurance Company having, through their agent in Glasgow, agreed to insure a steam-vessel at sea against fire,—Held, 1. (contrary to the judgment of the Court of Session), That such an insurance fell under the above statute; but, 2. That it was a Scotch contract, and that the statute did not apply to Scotland quoad hoc.

June 27. 1828.

2D DIVISION. Lord M'Kenzie, and Jury Court.

THE Albion Fire and Life Insurance Company, an English Company established in London for carrying on the business of insurance, had accredited agents in the chief provincial towns in

England and Scotland, authorized to receive orders of insurance, and to transmit these to the directors in London to be executed. The Company did not, however, (as they alleged), insure on ships or merchandise at sea, holding themselves prohibited from so doing by the statute 6. Geo. I. c. 18., establishing the monopoly of sea insurance in the two companies, the Royal Exchange and London Assurance Companies. Mills, residing in Glasgow, who was part-owner of the 'Robert Bruce' steam-boat, plying from the river Clyde to Liverpool, insured his share against fire with the Albion Insurance Company, at their office in Glasgow, where Hamilton was their agent, who thereon gave to Mills this receipt:—'Albion Fire and Life Office, Glasgow, 14th 'August 1819.—William Mills, Esq. having this day effected 'an insurance of L.200 with the undersigned on behalf of the 'Albion Fire and Life Insurance Company of London, on the 'property specified in the cheek corresponding with this memo- 'randum, a policy will be forthwith prepared at the office in 'London for the said insurance, and such policy will be deliver- 'ed to the assured, or to his, her, or their order, on the third 'Monday in the ensuing month, or on any subsequent day.

'(Signed) *p.* THOMAS HAMILTON, agent for the Company,
'ROBERT MITCHELL.*

'Premium, -	L. 1	4	6
'Duty, - -	0	7	0
	L.1	11	6

June 27. 1828.

'Insured up to the 29th September 1820.'

On the back of the receipt was written, 'This receipt insures, 'viz. on the Robert Bruce steam-boat, at present plying between 'Glasgow and Liverpool, L. 200. (Signed) *p.* THO. HAMILTON, 'R. M.'

In the same form insurances by seven other individual proprietors were effected.

Afterwards the proprietors of the Robert Bruce put another steam-boat, the 'Superb,' into the trade, and effected a joint insurance for behoof of the whole owners, both on the 'Superb' and 'Robert Bruce,' with the same office, and received a similar acknowledgment, with this indorsement:—'This receipt insures 'as under, viz. on the steam-boat Robert Bruce, including

* Robert Mitchell was Mr Hamilton's clerk.

June 27. 1828.

'machinery and apparatus belonging thereto,	L. 3,000	0	0
'On the steam-boat Superb, as above-mentioned,	3,000	0	0
'Sum insured on the above by the Albion secre-			
'tary in London,* - - -	4,000	0	0
	L. 10,000	0	0

'L. 5000 of the above-mentioned sum is insured on the Superb 'and L. 5000 on the Robert Bruce.'

No policies were delivered to the insured, but it appeared that policies had been executed in London and transmitted to the agent, containing, however, this proviso, that although the steam-boats should 'have liberty to lie or ply in any 'port, harbour, river, dock, or navigable canal in the united 'kingdom of Great Britain and Ireland, the insurance should 'be suspended and remain out of force during the time they 'may be at sea.' Observing this limitation on the risk, the agent wrote to the London secretary thus:—'31st August 1819. 'I am not disposed to think that the insurers on the "Robert 'Bruce" steam-boat, as per fire orders, No. 14. to 22. inclusive, 'excepting No. 21., will be satisfied with the introduction of the 'clause, "but not while the same shall be at sea." I think that 'in addition to the rivers the Channel ought to be admitted, as 'this vessel is expressly to ply between Clyde and Liverpool, 'and will be a great part of her time in the Channel.' The secretary answered, (13th September 1819), 'In answer to 'your remark respecting the clause which exempts the Com- 'pany from loss on steam-boats while at sea, I have to state 'that it is a point on which we have no choice. The Royal 'Exchange and the London Assurance are the only companies 'which have a right, as companies, to undertake insurances on 'vessels while at sea, and no other company can lawfully 'undertake such risk. If, therefore, the proprietors of the 'Robert Bruce are not content to hold our policies with the 'exception complained of, I will thank you to advise me, and 'we shall then of course consider the insurance not to be 'renewed after the present.'

This correspondence, however, and the existence of the exception it related to, were never communicated to the insured,

* This sum was to be taken by the Eagle Insurance Company of London.

who continued to pay, and the agent for the insurers to receive, the premium as it fell due. June 27. 1828.

When the joint insurance was about to expire, the owners effected a renewal for a twelvemonth from 24th June 1821; and the certificate bore, that 'the above policy has been renewed, 'and that the insurance granted thereby will continue in force 'from the 24th June 1821 to the 24th June 1822.'

The Robert Bruce, on 28th of August 1821, was destroyed by fire at sea, while on her voyage from Liverpool to Dublin, (a voyage undertaken by permission of the insurers). A demand for the amount insured having been made, the Companies refused to pay. Delivery was then required by the insured of their policies, which, when produced, were found to contain the clause suspending the policy during the time the boats happened to be at sea. The owners of the Robert Bruce (after using arrestment to found jurisdiction) then raised an action against the directors, proprietors, and secretary of the Albion Insurance Company, and against Hamilton their Glasgow agent,* concluding, as the summons bore, 'that in effecting the insurance for 'the said sum of L.10,000, the pursuers considered themselves 'as transacting with the said Albion Fire and Life Assurance 'Company, through the medium of their agent, the said Thomas 'Hamilton;' and concluded, 'that the Albion Fire and Life 'Insurance Company, and Thomas Hamilton, their agent in 'Glasgow, ought and should be decerned and ordained, con-'junctly and severally, by decreet of the Judge of our High 'Court of Admiralty in Scotland, immediately to furnish and 'deliver to the pursuers a valid and effectual policy of insurance 'upon the said steam-boats or packets, for the said sum of 'L.6000 sterling, and that for the period of one year, from the '24th day of June last 1821, when the premium therefor was 'paid; and containing the said policy the usual clauses, and 'an obligation of insurance against the usual risks as before 'specified, and, among others, an insurance against the risk of 'damage occasioned, or which may be occasioned to the said 'steam-boats or packets by fire, at any time, and any where, 'during the period aforesaid of the insurance; and whether such 'policy shall be furnished and delivered to the pursuers or not, 'or in whatever terms they may express, or have expressed the

* An action was also raised against the members of the Eagle Insurance Company, but it had not been brought to a conclusion when the appeal in the question with the Albion Insurance Company was taken.

June 27. 1828. 'same, they, the said defenders, ought and should be decerned 'and ordained, by decree foresaid, conjunctly and severally, to 'make payment to the pursuers of the foresaid sum of L. 3000 'sterling, being the sum insured, as aforesaid, upon the said 'steam-boat or packet Robert Bruce, with the lawful interest 'thereof from the said 28th day of August last 1821, when the 'loss and damage was sustained, and in time coming till 'payment.'

The defenders maintained,—1. That by 6. Geo. I. c. 18., it was declared illegal for any others than the Royal Exchange Assurance Company, and the London Assurance Company, to insure any ship or ships, goods or merchandise, at sea or going to sea, and that every such policy of assurance shall be ipso facto void: 2. That, in point of fact, they had not undertaken to insure the Robert Bruce against fire at sea, but only when in port or harbour. The receipts for the premiums, which were filled up by the agent, and delivered to the insured, formed originally a portion of the same paper which contained the order to be transmitted to London; and these orders so transmitted bore the special exception, that the risk should not subsist while the steam-boat should be at sea. It was not alleged, however, that either these orders or the policies had been seen by the pursuers.

The Judge-Admiral gave no judgment on the plea founded on the statute; but in respect of the qualification in the order and policies, assoilzied the defenders, but found no expenses due. The case was then brought by mutual reductions into the Court of Session, by whom they were remitted to the Jury Court, when this issue was sent to a jury:—'It being ad-'mitted, that on the 27th or 28th of August 1821, the steam 'vessel called the Robert Bruce, the property of the pursuers, 'was destroyed by fire while at sea, on her voyage betwixt 'Liverpool and Dublin,—Whether the defenders promised and 'agreed to insure the pursuers to the extent of L. 3000, or about 'that sum, from all loss and damage which might be caused by 'fire to the said steam vessel, while at sea as aforesaid? and, 'Whether the defenders have failed to perform the said promise 'and agreement, to the loss and damage of the pursuers? Dama-'ges laid at L. 3000.'

In support of their case, the pursuers relied on the certificates given to them by the Glasgow agent,— on the correspondence between him and the London Secretary; and adduced parole evidence that, in conversations between Mills and Mitchell, no notice was taken of any exception of loss while at sea: that the premium

was equal to what was paid for sea risk, and that insurance offices were in the uniform habit of sending the policy to the insured, but which had not been done in the present instance. To this evidence the defenders excepted, but the objection was overruled. They also contended, that, even if they had undertaken as in the issue mentioned, the Lord Chief Commissioner should direct the jury that such undertaking being void by statute, no action could be maintained upon it; and that, at all events, a general verdict ought not to be given against all the defenders, but only against the Albion Company, the principals, or else against Hamilton the agent. But the Lord Chief Commissioner directed the jury, that if they were satisfied that the evidence was sufficient to support the promise and agreement, they should find a verdict for the pursuers against all the defenders. The defenders tendered a bill of exceptions. The jury returned a verdict for the pursuers, and the amount was extrajudicially fixed at L.3000. The Court of Session, on the 11th July 1827,* disallowed the exceptions, and declared the verdict final and conclusive in terms of the statute. When, however, the pursuers moved the Court to have the verdict applied, the defenders craved to be heard on the plea in law, founded on the statute of Geo. I., and which had not been disposed of by the Judge-Admiral; which being permitted, the Court, on the 22d January 1828, in the action at the instance of the proprietors of the Robert Bruce, 'in respect the insurance in question is an insurance 'against the risk of fire on a steam vessel, which is not a marine 'insurance contemplated by the said Act,' found that the statute founded on 'does not apply to this case,' and repelled that as well as the other defences; found the defenders, conjunctly and severally, liable to the pursuers in the damages awarded, with interest, and expenses; and in the action of reduction at the instance of the Albion Insurance Company, sustained the defences.† The Jury Court also awarded the expenses incurred there to the pursuers. June 27. 1828.

The Albion Insurance Company appealed.

Appellants.—I. *(Exceptions).* It was against law to allow a written policy to be explained, enlarged, or contradicted by parole testimony, much more by mere conjecture and loose reference. The renewal referred to a policy by its number. Being

* 5. Shaw and Dunlop, No. 462.

† 6. Shaw and Dunlop, No. 141., where the opinions of the Judges will be found.

June 27. 1828. so marked out, the respondents could have consulted it, and seen what risks it covered; and if they refrained to do so, they have only themselves to blame. Even if the assured had no means of access to the policy, still the question would not have been, What did the assured mean or wish? but have, or have they not, been careless enough to contract in the dark? or has their agent (as in this instance) neglected common precaution? but, What did the underwriters by their policy undertake? It is no answer, that the respondents chose, without inquiry, to suppose that the terms were the most beneficial for themselves that could be desired. If they trusted to what might be, they did so suo periculo. There was no fraud on the part of the Company. They did not put upon the insured a contract different from what was intended. Indeed they never contemplated insuring sea risks. The issue sent to the jury was not, Whether there was fraud or mistake? but, What was the contract? and the terms of that contract is plain. The contract being in writing, and the terms distinct, and containing the exception, the jury should have been directed to return their verdict for the defender. If it had been parole; then, as it is not the habit or custom of the Company to bind themselves in that form, it would have become merely a contract with the agent, and he alone would have become bound. It is plain, from the words of the certificate, that it was not the duty of the appellants or their agent to send, but of the insured to apply for the policy. Besides, even if this risk had de facto been undertaken, the policy thereby (under the statute of Geo. I.) having become null and void, could not sustain an action; and, at all events, it was quite preposterous to direct that a verdict could competently be given both against the principals and against their agent. If the first assumed the contract, then the agent was not liable; and if the latter entered into the undertaking without authority, the Company are not bound. The presiding Judge, therefore, misdirected the jury, and the Court ought to have allowed the bill of exception.

II. *(Statute.)* It was illegal in the appellants to insure (if they did so) a sea risk, and equally so to agree to effect one. The distinction taken by the Court, that this is not a marine insurance, is too subtle to be sound. The statute is broadly worded, and will not admit that reading. Fire at sea is a maritime risk, and an insurance against it is a maritime insurance; and the statute 'prohibits assurance of or upon any ship or ships, goods or mer-'chandise, at sea, or going to sea.' It is plain that the statute extends to Scotland. That it makes the penalties recoverable in

any of his Majesty's Courts of Record at Westminster, cannot impair or limit the unqualified enacting words of the prohibition. If the contract were Scotch, the only result would follow, that the penalties could not be recovered in the Scotch Courts. But the contract was English in every sense of the word. The fictitious person created by a company possesses, exactly as an individual does, a domicile, and a forum; and the Albion Insurance Company's domicile and forum was England. It creates no substantial difference that they had an agent in Scotland. He held no greater power than his constituents; or rather he had no power until he had obtained the Company's ratification of the proposals to insure tendered to him. The insurance was made in London, (as is confessed in the summons), and the insured ought to have known that no other policy could be transmitted but what was allowed by the lex loci contractus. June 27. 1828.

Respondents.—I. *(Exceptions.)*—The real point in the case has not been raised by the appellants. The inquiry is not, whether the Albion Insurance Company did or did not take sea risks? but whether, in this instance, they or their agent, which is the same thing, contracted with the respondents, in such a manner as to lead the respondents to believe that the sea risk had been taken? The agent gave a certificate silent as to the exception, and so expressed as to cover sea risks; and when he knew that his constituent did not take a sea risk, he should have undeceived the insured, who were paying their premium on the belief that they were fully protected.

Lord Chancellor. You say that the policy renewed at midsummer 1821 was never shewn to you, and that the contract with the exception in it did not make the contract you entered into?

Adam. Precisely so, my Lord. Had the policy been handed over to us, we would have been effectually bound.

Lord Chancellor. And that you were not to assume that the agent or the company would make a policy different from your contract?

Adam. The respondents never suspected that the policy was not a sea policy. The objection raised by the appellants to the direction of the presiding Judge at the trial, proceeds on a mistaken view of the case. This was not an action on a policy, nor was parole evidence adduced to controul the express words of the policy forming the contract between the parties. It was an action for the policy that had been agreed upon, or for damages in lieu of the policy; and documentary and parole evidence was admis-

June 27. 1828. sible to shew what that contract was, and what the policy should be. An engagement to furnish a policy is a lawful and necessary contract sui generis, and the terms of the contract, and consequently the terms of the policy, may be proved by parole, by writ, or by circumstances. The question before the jury was not, what was the meaning of the policy, which the appellants had kept in their hand, and out of sight of the respondents? but what was the policy bargained and paid for? And on this point the jury was properly directed. Besides, the facts proved to the jury would have been sufficient, on the ground of fraud in the insurers, and gross mistake in the insured, to have relieved the latter from the limitation, even had the policy thus limited been timeously handed to them. The statute of George the First had no bearing on the fact under trial. A resident agent of a foreign party is, by the law of Scotland, bound along with his constituent, and he binds his constituent to those with whom he in that character contracts, whatever may be his private instructions; and it was not shewn that he, in dealing with the respondents as he did, acted beyond his instructions.

II. *(Statute).*—The Act of Geo. I. (commonly called the Bubble Act, and since repealed), had no relation to Scotland; and this is manifest from its object and structure, particularly from the Courts pointed out as having jurisdiction to try the cases arising upon it. The establishment in Glasgow was truly Scotch, carrying on that business which a Scotch company could have carried on. If the parent house in London have incurred penalties, they may be exigible; but that will not defeat the Scotch contract. It is besides manifest, that the Legislature could not have had steam-boats in contemplation. Indeed, the risk of fire is not properly, or in its own nature, a maritime risk, or naturally comprehended under the perils of the sea. Fire may be covered, according to the usual form, by a policy; but still the fundamental and radical risks are those properly arising from the perils of the sea, and policies relating to the true perils of the sea were what the statute regarded. At any rate, the insurers were informed that the insured would not be satisfied with the introduction of the clause; yet they remained silent, accepted the premium (suitable to a fire risk), and then, when the accident happened, endeavoured to escape on their own fraud and concealment.

The House of Lords pronounced this judgment:—'It is 'declared by the Lords Spiritual and Temporal in Parliament 'assembled, that although this House is of opinion that the

'insurance upon which the respondents sought to recover da- June 27. 1828.
'mages, is a species of insurance to which the statute 6. Geo. I.
'cap. 18. does apply, yet, inasmuch as this House is further of
'opinion, that the said statute, as to that part of it to which the
'interlocutor of the Court of Session of the 22d January 1828
'refers, does not extend to Scotland, the said appeal upon the
'facts of this case ought to be dismissed, and the interlocutors
'affirmed. It is therefore ordered and adjudged, that the said
'petition and appeal be, and the same is hereby dismissed this
'House; and, with the above declaration, that the several in-
'terlocutors therein complained of be, and the same are hereby
'affirmed.'

Lord Chancellor.—There is a case, my Lords, which stands for judgment, of the Albion Company against Mills. It was a case of this description, upon which at present, for a particular reason, I will say only a few words, as I wish, with respect to the question of form, to have an opportunity of further considering the course which ought to be adopted. The plaintiffs, the pursuers in the action below, were the proprietors of a steam-vessel called the Robert Bruce. There is an insurance company in London for fire and life insurance called the Albion Insurance Company. They have an establishment at Glasgow, a regular establishment and office there, and conducted by a person of the name of Hamilton. A considerable quantity of insurance business, on account of the London Insurance Company, was transacted at that office. The owners of the Robert Bruce applied at the office at Glasgow to have their vessel insured,—this vessel called the Robert Bruce. An agreement was entered into for the purpose by Mr Hamilton, the agent, and a policy was afterwards effected. Various questions have arisen, which were agitated in the Court below, and which have been much considered and discussed. One objection on the part of the Albion Insurance Company to pay this loss, was an objection arising out of the statute of 6. Geo. I. It was said, that any policy of insurance, or any agreement of the insurance entered into under the circumstances under which this particular insurance was effected, was, by means of that Act of Parliament, altogether void; and such argument was made use of both in the Court below and at the Bar here, for the purpose of determining this material and important question, whether this Act of 6. Geo. I. extends to Scotland, to contracts entered into and executed in that part of the united kingdom. The Court below were of opinion that the statute 6. Geo. I. did not apply to Scotland, and I am very much disposed to concur in that opinion.

But another most material and important question arose, much more complicated, and which was of this description, namely, whether the contract was a contract entered into in Scotland or in England; in other words, if the statute does not extend to Scotland, whether it was

June 27. 1828. a contract so entered into in Scotland as to render it valid and binding. The Court below appear to have differed with respect to that point, and they have come to no conclusion with respect to it; but they decided the question on another point quite wide of the decision of that question. They said, this was a case of loss that did not come within the Act; and I wish, for the purpose of directing the attention of your Lordships, and the parties in this case, to read the very terms of their judgment—the final judgment. (His Lordship then read it.)

Now, my Lords, I confess I am not disposed at all to concur in that judgment. I think it is impossible that that judgment, according to my apprehension and understanding, can be sustained. In the first place, If you look to the words of the Act of Parliament, they are most general and comprehensive. The words are, 'that if any person or 'persons described shall presume to grant, sign, or underwrite, after the 'four-and-twentieth day of June 1720, any such policy or policies, or 'make any such contract or contracts for assurance of or upon any 'ship or ships, goods or merchandises at sea, or going to sea, or take, 'or agree to take, any premium or other reward for such policy or 'policies, every such policy and policies of insurance of or upon any 'such ship or ships, goods or merchandises, shall be ipso facto void.' It is, in my opinion, impossible to say that an insurance on a steam-vessel against fire was not distinctly and precisely within the language of this Act of Parliament. And, my Lords, there is another circumstance to which I wish particularly to advert, which is this, that fire is one of the risks expressly mentioned in all policies of insurance, according to the form that now exists, and, as far as relates to that part of the case, existed at the time this Act of Parliament was passed. It not only comes expressly within the words of the Act of Parliament, but within the terms of the policy in use at the time. It appears to me, therefore, impossible, merely because some alteration has taken place with respect to the mode of propelling vessels of this description at sea, to say that cases of that kind do not come within the meaning and language of this Act of Parliament. It appears to me, with all respect and deference, (and I entertain the greatest respect and deference to the learned Judges by whom this is decided), to be a proposition which cannot be supported. But, my Lords, at the same time that I state that decision to be in my opinion erroneous, I do not undertake at this moment to say whether, on other grounds, the judgment may not be sustained; and if I should be of opinion, and your Lordships should be of opinion, that on other grounds the judgment may be sustained, whether still the House comes to decide at once upon the case as it at present stands, or whether it should be again remitted to the Court in Scotland, for the purpose of calling upon the tribunal there to come to a decision upon the point, which they seem to have avoided deciding, and to have cut the matter short by deciding the case upon the ground open to the objection, as it appears to me, to which I have referred—that is a question on which I have not yet made up my mind. I have had some consultation with a noble and

learned Lord, at present in the neighbourhood of this House. He thinks it is a question which deserves consideration; and I will endeavour to-morrow to give my opinion upon it, if I am in a condition with propriety to propose to your Lordships a judgment on the materials at present before you, without remitting the case to the Court below, and come to a determination and decision on the question whether this is to be considered as an English or a Scotch contract. If I am then, on the materials before me, authorized to propose to your Lordships a judgment, and it will be proper for this House to give a judgment on these materials without calling on the Court below to give their judgment, and pronounce a judgment upon it, I shall be ready to state my opinion. What that opinion will be, I will not at present anticipate, but I am at present ready and prepared to give that opinion. But on the point of form, I feel desirous that this case should stand over, for the purpose of giving me an opportunity of considering that question till to-morrow. June 27. 1828.

Lord Chancellor.—There was a case in which the Albion Fire Insurance Company were the appellants, and William Mills, Esq. merchant in Glasgow, and others, were the respondents. I took the liberty of calling your Lordships' attention to this case yesterday, with respect to a particular point; and after looking at the papers, and attending to them throughout, I should recommend to your Lordships to decide, that on the ground upon which the Court below pronounced their judgment, it cannot, in point of law, be sustained; but, upon the whole, looking at all the papers, and the proceedings which have taken place in the Court below, and the transaction itself, there is, I conceive, sufficient to justify your Lordships in affirming the judgment, though on a different ground.

My Lords,—The circumstances of the case are these:—There is a company in London, called the 'Albion Fire and Life Insurance 'Company.' That company is so constituted, that according to the law as it exists by virtue of the Act of 6. Geo. I. it is incompetent to effect insurances upon ships and merchandises at sea;—that is a point which is admitted in the case, and with respect to that it is not necessary I should make any further observation. This company has an establishment at Glasgow, and a regular office at Glasgow, called the 'Albion Fire and Life Insurance Office;' and they have a person attending there as an agent, a person of the name of Thomas Hamilton. They had been in the habit of entering into contracts and engagements to a considerable extent in Glasgow:—when I say they had been in the habit of entering into contracts and engagements to a considerable extent, I mean contracts and engagements similar to those which are the subject of the present inquiry. There were certain persons, who are the respondents in this appeal, residing in Scotland, who were the owners of a steam-vessel called the Robert Bruce. The owners of this vessel were desirous of insuring her; and they applied for that purpose to Mr Hamilton, at the office at Glasgow; and

June 27. 1828. upon their application at the office in Glasgow, the contract, to which I shall call your Lordships' attention, was entered into in these terms.—(His Lordship then read the contract.)

My Lords,—This contract was signed at Glasgow; it was drawn up at Glasgow, dated at Glasgow, and was signed at Glasgow by Hamilton, who was the agent for the company. According to the ordinary course of business, Hamilton communicated this transaction to his principals in London; and a policy of insurance was sent down to the office at Glasgow. It was not sent within the period limited by the contract; for it was not sent till the month of September, the contracts having been entered into in the month of July. Any person looking at that contract must see, that it is in its form a general contract of insurance; that is, a contract for a policy, which shall be a general policy of insurance. There is no limit whatever as to the places to which the contract is to extend. There is no exception in the contract; there is nothing expressing that, when the policy comes down, it shall contain a clause, that the insurance is to be suspended while the vessel is at sea. It is a general contract of insurance, or rather, they undertake that a general policy shall be executed. The policy of insurance that was sent down to the agent at Glasgow contained this clause: It was an insurance on the steam-vessel against fire; but there was this clause: 'This policy of in-'surance to be suspended and remain out of force during the time the 'steam-boat may be at sea.' Such policy of insurance, however, remained in the office of Hamilton. There is no evidence that it was ever shewn to the parties insured, nor any evidence to shew that the fact of this clause of exception was ever communicated to them. Thus the transaction went on for a year, the insurance being only for the period of a year.

At the expiration of the year, or shortly before that time, the assured applied to Hamilton the second time to extend the insurance another year. They paid Hamilton the premium of insurance for another year. There is no evidence to shew that the policy was communicated to them; there is no evidence whatever of that fact; on the contrary, there is evidence of a different description. There is no evidence to shew that the exception in the policy was, at that time, or at any previous time, communicated to the assured. The money was received by Hamilton, and a memorandum given that the policy had been renewed.

A short time after the renewal of the policy, the vessel was destroyed by fire, on her passage from Liverpool to Dublin; and the persons who thus considered themselves assured by this contract, applied to Hamilton for the payment of the loss. The answer they received was this: 'You are not entitled to recover; for, if you advert to 'the policy, you will find there is an exception in the policy, that the 'policy is not to have operation during the time the vessel is at sea.' The assured upon this commenced proceedings for the purpose of recovering the amount of the loss. Their proceedings were in the first

instance instituted before the Judge-Admiral, and the judgment was against the insured. It is unnecessary for me to enter into the terms of that judgment, for afterwards the proceeding came on before the Court of Session. June 27. 1828.

On this question coming before the Court of Session, it was considered that there were two points;—the one point was the question of fact, as to what the nature of the insurance was; the other was the question of law, to which I yesterday alluded, and to which I shall again call your Lordships' attention. It was conceived that the question should be remitted to the Jury Court. It was so remitted; and the issue I am about to read was that which was drawn up for the purpose of the trial, 'Whether the defenders promised and agreed to 'insure the pursuers to the extent of L. 9000, or about that sum, from 'all loss and damage which might be caused by fire to the said steam-'vessel while at sea as aforesaid, and whether the defenders have fail-'ed to perform the said promise and agreement, to the loss and 'damage of the pursuers?' Now your Lordships will perceive, that the question turned entirely upon this part of the issue, namely, Whether the agreement to insure extended to the period while the vessel was at sea? The cause came on for trial; the evidence was heard; and a verdict was found for the pursuers. Exceptions were taken to the evidence in the process of the trial. They were afterwards imbodied into a bill of exceptions, which was signed by the learned Judge who presided in the Court, and that has been printed in the papers which have come before your Lordships for your consideration.

It appears to me, on looking at the exceptions, that there is only one material point to which it is necessary to call your Lordships' attention. It was said, and justly said, that where there is a written agreement to insure a preparatory agreement, and afterwards a policy of insurance is effected in pursuance of that agreement, it is the policy which is the contract between the parties. The ordinary course of proceeding in the city of London is, that a slip is in the first instance signed, and after that slip is signed a policy is effected; and it is the policy which is the contract, and the slip cannot be adverted to for the purpose of explaining the meaning of the parties. It was argued, that no contract had been entered at Glasgow, that it was an agreement for a policy, that the policy had been afterwards executed, and that that must be considered, having been sent down to Scotland, to be the agreement between the parties. But, my Lords, there was this fallacy in that argument, the pursuers brought their action upon the agreement as entered into by Hamilton, as signed by Hamilton. What was that agreement? There was an agreement for a general insurance. It was an agreement that a policy should be executed; that policy to be executed was to be conform to the agreement. The policy had, it is true, been sent down, and if the parties had agreed to it, that would have bound them: but that policy did not conform to the original agreement; it was never communicated to the parties that there was an alteration; and if the

June 27. 1828. agent agreed to a general insurance, that being within his duty as agent, it was imperatively his duty under those circumstances to communicate to the assured, that the policy having come down, the parties in London did not conceive themselves authorized in executing a general policy, but only a policy with the exception to which I have referred. No such communication was made by Hamilton, and therefore the owners of the vessel never adopted that, for they never knew it. What, then, did they feel themselves justified in saying? It was this,—We have entered into an agreement with your agent at Glasgow for a policy of a particular description; you have never fulfilled that engagement; you have received our money, by which you bound yourselves to send down a general policy; instead of that you have sent down another policy, and we call upon you to fulfil that agreement. That was the nature of the action.

But, my Lords, this agreement was only for the year, and at the expiration of the year, as I have stated to your Lordships, an application was made to the company to renew the policy; and if the policy had been shewn at the time of the renewal, the policy would have been the contract; but when it was renewed nothing was said by Hamilton about the terms of it, nor was it shewn to the assured; therefore, when the money was paid for the renewal, according to every principle of equity—and the Court had jurisdiction both legally and equitably—according to every principle of law, and equity, and justice, this renewal had reference to the original agreement, and they ought therefore to have executed it conformably to the stipulations of the original agreement; and therefore, when it was contended, as it was strenuously in the Jury Court, that the Court had no authority to look into any thing but the policy, that was rightly overruled; and when it was repeated at your Lordships' Bar, it was impossible not at once to feel the fallacy of it, for it was clear that a policy of a different description was sent from that stipulated, and that it was not communicated to the parties that the agreement had not been fulfilled. The Jury therefore were, in my opinion, justified in the verdict they found; and when we dispose of this general question on the bill of exceptions, it appears to me unnecessary to refer your Lordships to the other grounds of objections stated in the bill of exceptions, because I think your Lordships will be of opinion, that if the way in which I am putting it is the correct mode of deciding it, they are of little consequence in the decision of this case.

The question of fact being disposed of, the next consideration was the question of law. It was said, that they could not recover on this policy. Why? Because, by the 6. Geo. I. the monopoly of insurance by companies on ships and merchandise at sea is given to two particular companies, namely, to the London Insurance Company, and to the Royal Exchange Assurance Company; and that therefore that contract was altogether void, whether it was an agreement for a policy, or a policy executed; that the Act of Parliament was a bar, the Act of

Parliament declaring, that all policies executed by six persons other than those companies shall be absolutely null and void. June 27. 1829.

My Lords,—The first question which arose in the discussion was this, and a very important general question it was, Does that Act extend to Scotland? that is, does that part of the Act to which I have referred extend to Scotland? The Act was passed with two views. It is the Act generally called the Bubble Act. It was an Act for the purpose of preventing those wild speculations which had currency at the period to which I have referred; and that part of the Act specifically extends to Scotland, for it is stated in the body of the Act, that the penalties which shall be imposed for the violation of that Act, shall be recovered in the Courts of Edinburgh, Dublin, or London. It is clear, therefore, that that part of the Act was intended to extend to Scotland. But, my Lords, with respect to the other it is quite different. In the first place, it is a little too strong to suppose that only these two English companies could be intended to have a right to insure, not confined to England only, but extending to other parts of the kingdom; but there is, in respect of that, this important distinction, that the penalties are recoverable only in the Courts of Westminster, and it is impossible not to see that that part of the Act of Parliament was intended to apply only to England. That point being decided, I conceive your Lordships will think yourselves justified in concurring in the judgment of the Court below.

My Lords,—Another question, very important in its nature, a question of law was raised. Here is an English company effecting an insurance by an English contract, and though this Act of Parliament may not extend to Scotland, this is an insurance by an English company; and therefore it is said, it would be mere evasion to say, that the parties in this case could recover on this in Scotland. My Lords, this turns entirely on the question, whether or not this was an English contract or a Scotch contract. The way in which it was argued at the Bar, and in the Court below, appears to me very fallacious. It was analogous to the argument to which I have already referred, which was raised in the Jury Court, that the policy is to be considered as the contract, and that the policy was executed here by the company; and if the policy were the ground of action, the proceeding on a policy so executed in London might admit of doubt and question. But, my Lords, that is not the case here. What is the nature of the action? Here is a contract entered into, not in London but in Glasgow, written in Glasgow, dated in Glasgow, and subscribed in Glasgow; the consideration paid in Glasgow at the office established, and for a long time established in Glasgow. Why is it then to be said, that that contract, I mean the original contract, was not a contract in Glasgow? If I send an agent to reside in Scotland, and he, in my name, enters into a contract in Scotland, the contract is to be considered as mine where it is actually made. It is not an English contract, because I actually reside in England. If my agent executes it in Scotland, it is the same as if I were myself on the spot, and executed it in Scotland. Therefore,

June 27. 1828. the original contract must be considered as a contract entered into in Scotland, and it was that original contract, and not the policy, which was the ground of the action; it was for the infringement of that my action was brought. You agreed to give me a general policy: You did not give me a general policy: I call upon you therefore for damages. It is said that the insurance company could not comply with that agreement, for that they could not execute a general policy. But if that is so, what had the assured to do with that? the agent stipulated to do it if the directors in London could not do it. It is my opinion, that the agent in Glasgow might have made a valid policy, but that if he could not have made a valid policy, they are bound to make compensation for the breach of that contract so entered into in Scotland,—they are bound, in my humble judgment, by that contract by which they engaged to effect a policy of a particular description, which they have not done; and not having done that, they are bound to make compensation to the party in respect of all the loss he has sustained by their not having done so, the party being entitled to consider the case precisely as if the agreement had been executed.

Then, my Lords, with respect to the renewal of the policy. What sort of renewal was that to be? Here is an agreement to execute a valid policy; the party insuring was entitled to consider that as a policy undertaking to do that which was to be done; the rule operates upon that which the party agreed to do, and which a Court of equity considers as already done; and therefore it is a renewal of a policy having effect in Scotland. I am happy to say, my Lords, that though the Court of Session were not unanimous upon this point, three of the Judges were of opinion that this was to be considered as a contract in Scotland; and the pursuers declared upon it as a contract so framed—a contract to be executed in Scotland. The other learned Judge seemed to entertain a contrary opinion; and it was in consequence of the learned Judges of the Court below differing in opinion upon this point, that they were led to do that which I think they were not justified in doing, namely, to decide the question on another point, which I consider as utterly untenable; because the Judges below have declared, that, according to their opinion, the construction of this Act of Parliament, which prohibits all companies from making insurances on ships and merchandises at sea, does not apply to the case of a steam-vessel. I stated to your Lordships yesterday my reasons for differing in opinion from these learned Judges with respect to that point, and I do that with the utmost deference and the utmost respect. From all I have seen as to the judgments of these learned Judges, I am led to entertain the highest respect for their knowledge and their attainments; but I am bound here, in advising your Lordships in reference to the judgment to be here pronounced, to give to you the result of my own opinion; and after paying every attention to the subject, I think that the grounds on which the learned Judges decided this case in the Court below cannot be sustained, but that, upon the proceedings and the

evidence, it is clear that the pursuers are entitled to recover, upon the principle of this being an agreement for an insurance entered into in Scotland, a contract entered into in Scotland,—the Act of 6. Geo. I. not extending to Scotland; and therefore the contract being a valid contract, the pursuers are entitled to recover damages, for the purpose of affording them compensation for the loss they have sustained by the breach of that agreement. On these grounds I should suggest, my Lords, that the judgment be affirmed, not in the terms in which it has been pronounced, but that, in your Lordships' opinion, the pursuers have made good their claim. The form of the judgment shall be prepared, and I will on a future day submit it for the opinion of your Lordships.

June 27. 1828.

Respondents' Authorities.—Philip's Evidence, p. 550.; Fell on Guarantee, p. 58.; Marshall on Insurance, p. 349.; Stat. 6. Geo. I. c. 18.

TEESDALE, SYMES, and WESTON—SPOTTISWOODE and ROBERTSON,—Solicitors.

Sir NEIL MENZIES of Menzies, Bart. Appellant.
D. of Fac. Moncreiff.

Earl of BREADALBANE and HOLLAND, Respondent.
Sol.-Gen. Tindal—Keay.

No. 10.

Property—River.—Held, (varying the judgment of the Court of Session), That an heritor was not entitled to erect a bulwark, or any other opus manufactum, on the banks of the river Tay, which might have the effect of diverting the stream of the river, in times of flood, from its accustomed course, and throwing the same upon the lands of an opposite proprietor, although it was alleged that the bulwark was intended to protect the heritor's lands from the flood.

July 4. 1828.

1ST DIVISION.
Lord Meadowbank.

THE river Tay, from the point where the water of Lyon joins it, runs eastward for some miles, and in that part of its course is bounded on the north by a plain about four miles long, and on an average about two-thirds of a mile broad, the property of Sir Neil Menzies. On the south the Tay is bounded by rising ground, occasionally very abrupt, and a flat, consisting of Bolfrax-haugh, nearly 21 acres, the property of the Earl of Breadalbane, and Farleyer Island, about 15 acres, the north half belonging to Sir Neil and the south half to the Earl. Bolfrax-haugh and the island are separated from each other by a slight hollow, now covered with a thick sward of grass, but which appears once to have been the ordinary channel of the river, and in floods is still the vent by which the swollen waters escape.

July 4. 1828. In 1798 Sir Neil's predecessor applied to the Court, by bill of suspension and interdict, against the then proprietor, Alexander Menzies of Bolfrax, complaining that the latter 'had thought 'proper, of his own hand, and without any authority known or 'communicated to the complainer, to begin to erect a bulwark 'upon the upper end of this small spot of land, along the bank 'of the river, at the distance of four or five yards from the ordi-'nary channel, which bulwark, if allowed to be finished, must 'have the necessary effect of turning the great body of water, 'which formerly went down upon the south side in the old 'channel, towards the north upon the complainer's property, and 'thus overflowing the lands upon that side in a much greater 'degree than formerly, and of raising the body of water so con-'siderably upon the plains of that side as to be in its conse-'quences extremely destructive to the complainer and his tenants;' and praying that 'the further erection of the foresaid bulwark, 'or any other opus manufactum on the banks of the said river 'Tay, should be simpliciter suspended, and the said Alexander 'Menzies interdicted and discharged from further proceeding 'therein.' The Court (in the Bill-Chamber) granted interim interdict against 'the further erection of the foresaid bulwark, or 'any other opus manufactum upon the banks of the foresaid 'river Tay;' and afterwards, on the expede letters, remitted 'to '——— ———, engineer, to view and inspect that part of the 'river in question, its different channels, and to report the pro-'bable effects of the operations the respondent (Alexander 'Menzies) is carrying on, both as to the property of the com-'plainer, and that of him the respondent; as also to answer all 'pertinent questions that may be put to him by either of these 'parties at the time of the inspection.' No further steps were taken until in 1821, when the Earl of Breadalbane, who had in the mean time bought the property of Bolfrax, wakened and transferred the action against the present appellant, as the representative of Sir John, who was now dead; and the Lord Ordinary remitted to Mr Jardine, engineer, in the terms of the previous remit. Mr Jardine having visited the places in presence of the agents for the parties, reported, that 'the bottom of the 'valley, near the scene of dispute, being about four miles long, 'and on average about two-thirds of a mile broad, nearly level 'across, is composed entirely of gravel, sand, mud, and other 'alluvial matter, to an unknown depth, while both sides of the 'valley rise rapidly into rocky precipices. Indeed it is obvious 'that the river Tay has at different times traversed every part of

'the bottom of the valley, and washed alternately both of its 'rocky banks. The floods in the river Tay and tributary 'streams are frequent during the autumn, winter, spring, and 'sometimes rise to such a height as nearly to overflow the whole 'bottom of the valley, which has obliged the complainer to make 'fences, in the lower parts of the bottom of the valley, of stone 'piers or cut-waters, which support horizontally wooden rails, in-'stead of the usual kind of fence employed in that place, composed 'of an earthen dyke and quickset hedge. The course of the old 'branch of the river Tay, which had run between Bolfrax-haugh 'and Farleyer Island, is still distinctly visible by a continuous 'hollow in the ground.' After describing the locality with reference to a plan, the report proceeded,—'Part of this old water-'course has been ploughed, and the whole of it is covered with a 'thick sward of grass; and since the speats of the river have not 'preserved it in the state of bare gravel, this old water-course 'does not appear to be now a portion of the channel of the river. 'In defending haughs and holmes against the encroachments of 'a river which forms the common boundary between the lands 'of two conterminous proprietors, two methods have usually 'been adopted; one consists in facing the gravelly margin of 'the ordinary channel of the river, and sometimes part of its 'bottom, with stone and other heavy firm materials; and the 'other, in raising embankments of earth and other matters above 'the level of the surface of the haughs, at a distance from, and 'nearly parallel to the margins of the ordinary channel of the 'river, so as to form the banks of the extraordinary or flood 'channel of the river. The former method has been practised 'to a small extent below the mouth of Camuserny burn, on the 'northern or convex side of the ordinary channel of the river, 'where much more is still required to be done, and the latter has 'been employed at the upper end of Bolfrax-haugh. It is evi-'dent, that in making embankments to confine the highest speats 'of rivers, for the purpose of preventing them from overflowing 'the adjacent haughs, the embankments should be placed at a 'sufficient distance from the ordinary margins of the river, so as 'to form an ample water-way for the largest floods in their artifi-'cial extraordinary channels. In applying these general views 'of the question to this particular case, it will be found that the 'embankment at the upper end of Bolfrax-haugh is too near the 'margin of the ordinary channel of the river, and that the jetty 'at the head of it is an encroachment on the alveus of the river.' The report then described the embankment to vary in distance from one to two yards from the margin of the ordinary channel

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July 4. 1828. of the river; to be 207 yards long, and its top nearly level, varying from three feet and a half to four feet above the level of the natural surface of the ground at its back; and the highest floods had not been observed to flow over the top of it. The engineer added, that he had drawn, upon the plan, lines along the haughs, representing 'the fronts of the nearest lines of em-'bankment to the ordinary margins of the river that either party 'should be allowed to approach in making embankments, to pre-'vent the speat waters from overflowing the other low haugh 'lands, although it should not suit the convenience of the other 'to avail himself of the same privilege at the same time; it being 'however highly desirable, in all such cases, that the encroach-'ments should be made, at liberal distances from the ordinary 'margins of the river, on both at the same time.'

After this report was lodged, a record was prepared, and closed; and, on hearing parties, the Lord Ordinary declared the interdict 'perpetual, in so far as it prohibits and inter-'dicts the Earl of Breadalbane from continuing to erect the 'jetty, or any other building, upon the alveus of the river 'Tay; but before farther answer as to the question of the 'Earl of Breadalbane being entitled to erect any jetty, bul-'wark, or other building upon the banks of the river Tay,' appointed parties to debate; and having thereafter ordered Cases on this point, and reported them to the Court, their Lordships, on the 4th July 1826, recalled the interdict, found the letters orderly proceeded, and the charger entitled to his expenses.*

Sir Neil Menzies appealed.

Appellant. The embankment complained of, though not on the ordinary alveus of the river, is within its extraordinary or flood channel; that is, within that space which is covered, not merely by the overflowing of the river, but by the rolling streams of its flood. It is thus an encroachment on the extraordinary alveus or proper water-way of the river in flood; is inconsistent with the fair and judicious management of the stream; and will force a great proportion of the river, when in floods, upon the appellant's estate. The danger of inundation has been hitherto greatly obviated by the old water-course, which, though now covered with grass, was not many years ago nothing but gravel. It has not been cultivated for more than forty years. It was originally part of the bed of the river, and at present forms part

* 4. Shaw & Dunlop, No. 474.

of the flood channel, and thus carries off the swollen waters, which if not allowed to escape by that conduit, must flow upon the opposite flat. But the erection of the embankment shuts up the gorge, and causes the flood to devastate the appellant's property for miles, whilst the advantage to the respondent is trifling, and not worth the expense of erecting it. The appellant cannot, from the intervention of tributary streams, effectually embank his side; and even if he could, the expense would be enormous. The respondent is using his property in emulationem vicini, and to the enormous injury of his neighbour. The jetty is not an ancient construction—is within the alveus—and forms part of the line of embankment complained of. The conclusion in the suspension and interdict was general, but its object was simply to prevent any opus manufactum which should form an obstruction to the proper water-way of the river in flood, or turn the flood-stream of the river from its natural and ancient course, and throw it on the appellant's property. There is no conclusion for the removal of any thing built or erected. The appellant's case rests on sound principles. A stream or river belongs in common property to the proprietors of the banks between which it flows; and of two opposite proprietors neither is entitled, without the consent of the other, to make any new works or opus manufactum by which the natural course of the stream or river may be altered. In re communi melior est conditio prohibentis, especially where great damage to the opposite proprietor would result from the change. No doubt, where there has not been any distinct separate servitude constituted against him, the common proprietor may take the natural and primary use of the water, even to its exhaustion; but otherwise the flumen is common, and its condition and nature cannot be changed against the will of the other proprietor. The restriction against operating on the alveus depends on this common right in the stream itself, not on any common right to the channel. In the latter, a centre line marks the boundaries; but as operations on the alveus alter the state of the stream, which is common property, the party not consenting to the alteration is entitled to be restored against it. This rule is applicable, not merely to the ordinary channel of a river, but to its extraordinary or flood channel. The one is as much the natural channel of the river as the other, and suited to the respective seasons of the year. There is no sound reason for saying that an opus manufactum is illegal in the former, and legal in the latter situation. The river in flood has its proper course and water-way just as

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July 4. 1828. much as in its ordinary state. To shew the truth of this it is only necessary to inquire, How will the operation affect the stream? and if the answer be, That it will either for the time, or permanently, change the course of the river, and injure the neighbouring proprietors, the remedy will be given. Besides, in the present instance, the respondent is shutting up one of the branches whereby the flood waters escape; and he is no more entitled to do so, than to run a bulwark across any channel that is filled with water from the beginning to the end of the year. He has not even the plea of preventing encroachment by the river on his own side; for the hollow is the river's natural and only mode of escape when swollen. Even if the respondent adopted the line marked out by the engineer, the mouth of this water-course would be shut; but that line he is not willing unconditionally to betake himself to.

Respondent.—The respondent's lands are exposed to inundations from the river Tay. There has stood from time immemorial a jetty somewhat within the alveus of the river; but the embankment the respondent's author contemplated was altogether free of the river, and entirely within his own grounds. As the legal step the complainer betook himself to does not conclude for the erections being demolished, the jetty, a finished opus, must stand; and as to the contemplated extension of the embankment, the interdict is undoubtedly too wide, since it would prevent every embankment, even beyond the line of the rolling stream in flood, and such as the engineer states that a party ought to be permitted to make. On the law of the case, the respondent maintains, that he is entitled to protect his ground from danger of overflow by banking the river out, and that he may make the bank of any form, size or structure, which he pleases, provided it be entirely within his own ground. He has not encroached on the alveus, or done any thing inconsistent with the fair and judicious management of the stream. It is clearly the indisputable right of every proprietor to keep the river within its ordinary bounds if he can. Indeed the very purpose of embanking is to prevent the river expanding into extraordinary bounds. There is no solidity in the appellant's distinction between the ordinary and the extraordinary current of the rolling stream of a flood. In one sense, there is an ordinary and an extraordinary current, namely, where there is a difference in the volume of the water in its usual channel. Accordingly, in deciding on the alveus of a river, you may measure up to the height of the stream, not as at its lowest

ebb, but at its general height, evinced by the regular and visible action of the water. The appellant, however, maintains, because in extreme cases the river may swell far beyond its usual limits, therefore the proprietor cannot bank it out, which would open every valley in the country to devastation. The space called the old water-course cannot be shewn to have been the 'constant bed of the river,' and it is not now part of the flood-channel in the proper sense of the word. From its elevation it cannot receive any of the swollen waters until the neighbouring plain is covered; so the damage is done before this alleged sluice comes into play. In point of fact, there has been no communication between this old water-course with the Tay within the memory of man; on the contrary, it has been for more than forty years cultivated like any part of the adjacent soil. Whether or not the expense which the embankment will cost is more or less than the advantage desired, is jus tertii to the appellant, and the plea of emulatio vicini is unfounded and misplaced. The respondent is willing to continue the embankment on the line drawn by the engineer, leaving to the appellant to make or not similar erections, as he sees proper. July 4. 1828.

The House of Lords ordered and adjudged, 'that the respondent ought to be prohibited and interdicted from the further 'erection of any bulwark, or any other opus manufactum, upon 'the banks of the river Tay, which may have the effect of diverting the stream of the river in times of flood from its accustomed 'course, and throwing the same upon the lands of the appellant; 'and that, with this declaration, the cause be remitted back to the 'Court of Session, to vary the interlocutors complained of in such 'manner as may be consistent with the above declaration, and to 'do further in the cause as may be just, and in conformity therewith.'

LORD CHANCELLOR.—My Lords, There is a case which was argued before your Lordships, at your Lordships' Bar, some time since,—an appeal from the Court of Session of Scotland in a case between Sir Neil Menzies and Lord Breadalbane; and I will beg to call your Lordships' attention particularly to this case, because I have the misfortune to differ in opinion from the Judges of the Court below. I will state to your Lordships the grounds of the opinion I have formed, and which have led me to that difference.

My Lords,—It is a question arising out of an embankment on the river Tay. The river Tay, on the north side, at the spot in question, is bounded by a considerable extent of flat land, belonging to Sir Neil

July 4. 1828. Menzies; on the southern side it is chiefly bounded by high land, but this high land terminates at a point called Bolfrax-haugh, which land belongs to Lord Breadalbane. Bolfrax-haugh continues for the space of about 27 acres, when there is another piece of land, Farleyer Island, part of which belongs to Lord Breadalbane, and between those two places there is a portion of the old channel, as if the water had formerly ran in that direction. My Lords,—There are some facts not at all in dispute in this case. Every person knows the character of the river Tay; and that in times of flood, that is, in autumn, winter, and in the spring, the flood stream takes its course with very considerable violence and force along this piece of land to which I have referred. It is therefore obvious, that an embankment running parallel to the stream, commencing at the first point of Bolfrax-haugh, and carried up to Farleyer Island, would have the effect of stopping up the old course of the flood stream, and throwing it entirely on the opposite piece of land belonging to Sir Neil Menzies; and the question in this case is, whether the proprietor of this land, Bolfrax-haugh, has a right so to do?

My Lords,—It is necessary I should give your Lordships a history of this case. The land which now belongs to Lord Breadalbane was formerly the property of Mr Alexander Menzies, and in the year 1778 he commenced these works, when he either formed or repaired a jetty in the alveus of the stream, and he connected with that jetty the embankment in question, which embankment is one or two yards distant from the course of the stream, about three feet in height, sufficiently high to turn the flood water of the river. Those works were carried on, I think, to the extent of about 200 yards. In consequence, Sir John Menzies, then the proprietor, filed a bill of suspension and interdict; an interim interdict was obtained, and further proceedings were carried on; but these further proceedings were all at once suspended, and the interdict continued till the year 1821. In the mean time, Lord Breadalbane purchased the property of Mr Menzies; and having purchased the property, he revived those proceedings. When the case came before the Lord Ordinary, as far as related to the jetty, and any other works in the alveus of the stream, he was of opinion the interdict should be continued; but he referred the question, as to the embankment upon the side of the river on the property of Lord Breadalbane, for further debate and consideration. It ultimately came before the First Division of the Court of Session, and the interdict, as far as related to the embankment, was dissolved. I should state also to your Lordships, that while this affair was going on before the Lord Ordinary, an engineer of considerable eminence, Mr Jardine, was, according to the course of proceedings in the Court of Scotland, directed, as the servant and officer of the Court, and standing between the parties, to view the place and report his opinion; and without going into the minute particulars of that report, I may state, that it is clear that if this embankment should be continued, as it is projected, along

the banks of the river, it will have the effect of throwing the ordinary flood streams of the river off the lands of Lord Breadalbane, and on the lands of Sir Neil Menzies. Many circumstances were referred to at the Bar, with respect to the law of England upon this subject. It is quite unnecessary to trouble your Lordships with any observation on the law of England, and particularly on the law of England with reference to particular places, because it is clear, beyond the possibility of a doubt, that by the law of England such an operation could not be carried on. The old course of the flood stream being along certain lands, it is not competent for the proprietors of those lands to obstruct that old course, by a sort of new water-way, to the prejudice of the proprietor on the other side; and I am the less disposed to trouble your Lordships with reference to the law of England, for that can be referred to only by way of illustration. This case must be decided by the law of Scotland. Now, with reference to the law of Scotland, this is perfectly clear, that a superior heritor cannot direct any part of a stream to the prejudice of an inferior heritor. It is also clear, that an inferior heritor cannot do that which shall cause the water to stagnate, to the prejudice of the superior; that is acknowledged to be clear law. But it is said, that applies only to the alveus of the course. But it does not appear to me that there is any solid ground for the distinction. The ordinary course of the river, is that which it takes at ordinary times; there is also a flood channel: I am not talking of that which it takes in extraordinary or accidental floods, but the ordinary course of the river in the different seasons of the year must, I apprehend, be subject to the same principle. July 4. 1828.

But, my Lords, let us see what is said on this subject by the institutional writers on the law of Scotland. Erskine, in his Institutes, is distinct, as it appears to me, and precise upon the subject. He says,— 'When a river threatens an alteration of the present channel, by which 'damage may arise to the proprietor of the adjacent or opposite ground, 'it is lawful for him to build a bulwark ripæ muniendæ causa, to pre-'vent the loss of ground that is threatened by that encroachment;' so that the proprietor whose lands are threatened to be washed away, may, for the purpose of protecting his own property in a case of that description, raise a bank for the purpose of his own security; but this bulwark must be so executed, as to prejudice neither the navigation, nor the grounds on the opposite side of the river; and as a guard against these consequences, the builder, before he began his work, was obliged by the Roman law to give security. Nothing, therefore, can be more distinct and precise than the language of Erskine in his Institutes, with respect to this particular case. He says, 'You may pro-'tect your own property from destruction;' so you may, by the law of England: but he says in distinct terms, 'Though the river threatens to 'change its channel and to encroach upon your land, you cannot pro-'tect yourself to the prejudice of the opposite proprietor.' Lord Stair

July 4. 1828. in his Institutes, though not so clear and precise, yet in general terms confirms that which is laid down by Erskine in his Institutes.

My Lords,—The language of the Roman law, according to the passages cited in the Case, confirms the same doctrine. It is there said, (39. Dig. t. 3. l. 1.) 'Opus quod quis fecit ut aquam excluderet, quæ 'exundante palude in agrum ejus refluere colet, si ea palus aqua pluvia 'ampliatur, eaque aqua repulsa eo opere agris vicini noceat, aquæ pluviæ 'actione cogetur tollere;' and, according to a passage quoted in the printed papers on the table of your Lordships, Voet repeats the same doctrine. In the Digest your Lordships will find another passage to the same effect, under the title 'De Aqua,' (lib. 39. tit. iii.) 'Hæc autem 'actio locum habet in damno nondum facto, opere tamen jam facto; hoc 'est de eo opere, ex quo damnum timetur, totiensque locum habet, quo-'tiens manufacto opere agro aqua nocitura est; id est cum quis manu 'fecerit quo aliter flueret, quam natura soleret; si forte immittendo eam 'aut majorem fecerit aut citatiorem aut vehementiorem; aut si compri-'mendo redundare effecit, quod si natura aqua noceret, ea actione non 'continentur.' It appears to me that that passage (and there are others to the same effect in the Digest) confirms the opinion laid down by Erskine in his Institutes with respect to the law of Scotland, in confirmation of which he refers to the Roman law. It is true that passages may be found in the Digest appearing to have a contrary tendency, but I think they may be all reconciled: or, consider the subject in this light, that these passages to which I am now alluding have reference to accidental and extraordinary casualties, from the flood suddenly bursting forth, and they go to this, that, in such a case, the parties may, even to the prejudice of their neighbours, for the sake of self-preservation, guard themselves against the consequence;—perhaps in this way the different passages in the Digest may be reconciled.

However, my Lords, the principal authority, as it was conceived in the Court below, and as it was at your Lordships' Bar, was a case decided in the year 1741,—the case of Farquharson v. Farquharson.* It was considered that that was a case directly in point; and if that had been a decision directly in point, I confess I should have had very great hesitation in declaring to your Lordships the opinion I am now doing. But I have read through that case, and attended to the different reports of it with the greatest attention, and I think that it is distinguishable in almost every particular from the case now before your Lordships. That was the case of the land of two proprietors on the river Cluny, on opposite banks of the river, which runs northward, and falls into the river Dee. Auchindyne grounds were on the left bank; Invercauld's grounds on the right. Invercauld on his grounds had erected a mound, and the question was as between him and Auchindyne, whether he was entitled to erect that mound; and it was decided that he was. But the circumstances were of this description:—The river had been con-

* The papers were reprinted, and laid before the House.

tinually going to the eastward. It had in one instance actually departed from its original course, and taken a new direction, placing a part of Invereauld grounds on Auchindyne side, and was obviously repeating, or attempting to repeat, the same operation by encroaching on Auchindyne grounds. The mound erected, therefore, was not to have the effect of altering the old course of the river, but it was to have the effect of preventing the old course of the river from being altered; and that, I apprehend, is a most material distinction in cases of this kind. But, my Lords, independently of this, there was evidence to shew, that at least a considerable part of the bank was built on old foundations. There was further evidence of this description, which, with respect to cases like the present, is of the most important character, that, according to the custom of that part of the country, proprietors on the opposite sides of the rivers had embanked against each other; and in this particular case it was proved, that Auchindyne had himself embanked on his side of the river, for the purpose of preventing the overflow of the water on his side, so as to throw it on Invercauld; and it was proved also as the last circumstance, that the destruction of the grounds of Invercauld would have followed if these works had not been allowed, and that the most trifling damage in point of amount was occasioned to the proprietor on the other side. It was under these circumstances, with all these facts appearing, that the Court gave their opinion in favour of Invercauld. Now I think that your Lordships will be of opinion, that that case is distinguishable in all its particulars from the present. That was a dam erected to prevent a change in the course of the water, and it was sanctioned also by the custom in that part of the country, and sanctioned also by the practice which had prevailed as between those different and opposite proprietors. Under these circumstances, I should humbly submit to your Lordships, that Lord Breadalbane in this case ought not to be allowed to carry on this work to the prejudice of Sir Neil Menzies, and that the judgment of the Court below cannot be sustained. The interdict is in terms too extensive, because it prevents new opus manufactum on the banks of the river without qualification. It will be necessary, in the form of judgment, that that should be in some way qualified. I shall, therefore, prepare a judgment, and submit it to your Lordships' consideration.

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Appellant's Authorities.—2. Ersk. 1. 5. and 2. 9. 13.; Dict. voce Property; L. Glenlee, March 10. 1804, (12,834.); Hamilton, March 5. 1793, (12,824.); Dick, Nov. 16. 1769, (12,813.); Town of Aberdeen, Nov. 22. 1748, (12,787.); Fairlie, Jan. 26. 1744, (12,780.); 39. Dig. t. 3. l. 1. § 2.; 39. Veet, 3. 4.

Respondent's Authority.—Farquharson, June 25. 1741, (12,779. and No. 5. Prop. Elch.)

SPOTTISWOODE & ROBERTSON—J. CHALMER,—Solicitors.

No. 11.

WILLIAM EATON and HUGH COWAN, Appellants.
John Campbell—Fullerton—Keay.

ALEXANDER MURDOCH, Curator Bonis to JOHN and ROBERT WATSONS, Respondent.—*Adam—Sandford.*

Cautioner—Tutor—Curator.—A curator bonis having been appointed to two uncognosced lunatics, and found caution for performance of his duties; and having, by authority of the Court of Session, (given in an action of cognition and sale at his instance alone), sold the heritage in which the lunatics were fiars; and having become bankrupt, indebted to them in a large balance;—Held, (affirming the judgment of the Court of Session,) That the cautioners were responsible for the balance, although it was alleged that, as curator bonis, he had no title to insist in a cognition and sale, nor the Court any authority to empower him to sell.

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1ST DIVISION.

ROBERT and JOHN WATSONS were vested in the fee of certain heritable property in Ayrshire, liferented by Smith. Although they had not been cognosced, they laboured under severe mental derangement, and were incapable of managing their affairs. In 1815, the Court of Session, on a petition for that purpose at the instance of their father and nearest of kin, appointed 'John 'Aitken to be curator bonis to the within designed Robert Wat- 'son and John Watson, during the subsistence of their infirmity, 'and this with all the usual powers, and the said John Aitken 'always finding caution before extract, in terms of the Act of 'Sederunt.' Thereafter, Eaton and Cowan, as cautioners, sureties, and full debtors with and for Aitken, bound themselves, conjunctly and severally, their heirs, executors, and successors, that 'I, the said John Aitken, shall duly and faithful- 'ly manage the means and estate belonging to the said Ro- 'bert Watson and John Watson, during the subsistence of 'their infirmity, or till the curatory shall be recalled; that I 'shall make up inventories thereof, and do exact and timeous 'diligence for recovering the same, and shall hold just count and 'reckoning for my intromissions in virtue of said act of cura- 'tory, during the continuance thereof, and make payment to such 'person or persons as the said Lords shall appoint; and that I 'shall obtemper, fulfil, and obey the whole rules and regulations 'prescribed by the Act to be observed by Lords' factors in the 'like cases—under the penalties, and with certification as therein 'contained.'

In 1816, Aitken, in the character of curator bonis, raised a summons, to which he called as defenders Smith the liferenter, the nearest in kin to the lunatics, their father, and John Watson,

one of the lunatics, (who, it was alleged, had sometimes lucid intervals), and setting forth, that the said Robert and John Watson required 'a constant and daily advance for their support; and 'true it is that the pursuer, as curator bonis foresaid, has no 'lands or heritages, except the fee of the heritable property 'before-mentioned, and no moveable estate or fund whatever, 'out of which to advance the sums necessary for the aliment 'and support of the said Robert Watson and John Watson, 'or out of which he can be reimbursed of the advances already 'made on their account as aforesaid, or make payment to the 'said John Smith, during his lifetime, of the annualrent of the 'said moveable estate expended as aforesaid; and that the said 'John Smith being entitled to the liferent of the said heritable 'estate, and having also a claim on the fee thereof for the life-'rent of the said moveable estate, the fee of the said heritable 'property is thereby, and by the growing interest upon the pur-'suer's advances, greatly deteriorated; and the said Robert and 'John Watson have, in the mean time, no fund for their ali-'ment and support; whereas, by a sale of the said heritable pro-'perty, the same may yield a price sufficient to provide a fund 'for payment to the said John Smith of the liferent interest to 'which he is entitled as aforesaid, to reimburse the pursuer of 'the advances already made by him for the said Robert and 'John Watson, with interest thereon, and afford a surplus suffi-'cient to yield a fund for their aliment and maintenance; so that 'it becomes necessary that the foresaid lands and heritages 'should be sold for the purposes above-mentioned. Therefore 'the Lords of our Council and Session ought to take cognition 'of, and ascertain the amount of the pursuer's advances on ac-'count of the said Robert Watson and John Watson, the pursuer 'being ready to produce the vouchers, and depone to the verity 'thereof; as also to take cognition of the yearly value of the 'said John Smith's liferent interest above-mentioned, and of the 'yearly value of the foresaid lands, houses, and others, with the 'pertinents: which cognition being so taken, our said Lords 'ought and should find and declare, that there is a necessity for 'selling the said lands and others belonging to the said Robert 'Watson and John Watson, and that such a measure will be 'for the utility and advantage of the said Robert and John 'Watson, and of the pursuer as their curator bonis foresaid. 'And the same being so found and declared, the said Lords of 'Council and Session ought and should grant full power, li-'berty, and warrant to the pursuer, and his successors in the said 'office of curator bonis to the said Robert Watson and John

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July 4. 1828. 'Watson, with or without the consent of the said Robert and 'John Watson, or either of them, to sell, alienate, and dispone 'the said lands, houses, and others, belonging to the said Robert 'Watson and John Watson, or any part or portion thereof, he-'ritably and irredeemably, or under reversion; and that it shall 'be lawful to the pursuer, as curator bonis foresaid to the said 'Robert Watson and John Watson, or his successors in that 'office for the time, with or without the consent of the said Ro-'bert Watson and John Watson, to make, grant, subscribe, and 'deliver to the purchaser or purchasers of the said lands, houses, 'and others, dispositions, alienations, assignations, conveyances, 'and other writs, rights, and securities necessary for establishing 'the rights thereof in their persons,' &c. Along with this summons, letters from Smith and the two lunatics were produced, granting concurrence to the sale, on the ground that the 'mea-'sure is evidently for the good of all concerned,' and authorizing a dispensation of the legal induciæ, and holding the summons as legally served on them. The body of these letters were in the handwriting of Eaton. Thereafter, evidence was taken as to the value of the lands, (Eaton acting as commissioner), and the report of an accountant obtained as to the expediency of the sale; upon considering which, the Court found the necessity and expediency of the sale sufficiently instructed; and therefore granted full power to Aitken, or his successors in the office of curator bonis, with or without the consent of the Watsons, upon due advertisements being previously made, to sell and dispone the lands libelled; and found and declared, 'that all dispositions, alienations, assig-'nations, and other writs, rights, and securities so to be made 'and granted, shall be as good, valid, and sufficient to the re-'ceivers thereof, as if the same had been made, granted, and 'subscribed by the said John and Robert Watsons themselves, 'in perfect sanity, with all solemnities requisite; and that the 'same are never to be revoked by the pursuer, as curator bonis 'foresaid, or his successors in that office, or by the said Robert 'Watson or John Watson, their heirs or successors, in time 'coming,' &c. There was no order made as to reporting the sale, or securing the balance of the price.

The sale produced L. 5725. Out of this sum Aitken paid all claims on the estate, and retained in his hands the balance, about L. 3000. It remained there six years, but without any step being taken by the cautioners to have it secured. Aitken became bankrupt, was sequestrated, and compounded for 6s. 3d. in the pound. Alexander Murdoch was appointed cura-

tor bonis to the Watsons, and made appearance in an application by Eaton and Cowan to the Court of Session, to ascertain the state of the curatory accounts, and for discharge and exoneration from their cautionary obligation. This application having been remitted to an accountant, he reported a balance against the cautioners of L. 3306. 11s. 5d.—holding, as an article of charge against them, the whole price produced by the sale, with interest, under deduction of the payments made by Aitken. The cautioners objected to this report; but the Court, (9th June 1826), approved of the accountant's report, and decerned, with expenses.* July 4. 1828.

Eaton and Cowan appealed.

Appellants.—1. Cautioners for the performance of the duties of a curator bonis, vested with the usual powers, are not liable for the consequence of abuse of powers different from and more extensive than those usually attached to the office. The rule is fixed, that cautionary obligations are rigidly interpreted according to the letter of the obligation. A change of risk frees the cautioner. Therefore here the appellants, although bound for intromissions in virtue of the act of curatory, and obliged to obey the regulations prescribed by the Acts of Sederunt, were not responsible for a sale effected in virtue of an act of the Court, proceeding on a narrative of special circumstances, held sufficient to shew that unusual powers should be conferred on the curator. The appellants were only liable for the due exertion of his usual powers, and under these usual powers no sale of the heritage could have taken place. The appellants were not called as parties to the summons of cognition and sale, nor had they any interest to appear. 2. The reparation of the injury sustained by the misconduct of the party intrusted with the power of sale, is to be sought for, not in the form of a claim against the appellants for the due exercise of a power of a different kind from that for which they were responsible, but in an action for the recovery of the heritable subjects themselves, the sale of which was clearly illegal and incompetent. The appointment of a curator bonis by the Court is necessarily limited to the administration of the property. He does not represent the person of the ward, and has no power to sell. Even, then, had the proceedings been regular, the sale was null; and the securities, or the person now representing them, have their recourse, and can yet vindicate the property itself. But the proceedings were

* 4. Shaw and Dunlop, No. 417. where the opinions of the Judges will be found.

July 4. 1828. grossly irregular, and contain in gremio ample grounds of reduction, independent of those which may be founded on want of power to sell at all.

Respondent.—1. The obligation and responsibility undertaken by the appellants was of a general and comprehensive nature, making no distinction between ordinary and extraordinary management. If the principal was awanting in either, his sureties became liable. In particular, they were bound for his 'intromissions;' and he did intromit with the sums for which, under the cautionary undertaking, they made themselves, and have been made by the Court, responsible. It is of no consequence, however, whether the sale was an act of ordinary or of undue management. If the former, the curator was bound to have secured the balance in his hand, and if the application for a sale was an uncalled-for measure on his part, his cautioners are as liable for that unjustifiable act (supposing it to be so) as any other. Still the price was received by him in the full knowledge of the appellants, and allowed to remain in his own hands, and exposed to the risk of his insolvency. 2. But truly he was quite entitled to take the measures he adopted. He was entitled and called upon to do so; and the necessities of the case of his wards left no alternative. The present action is, therefore, properly directed against the appellants; and as to the recourse against third parties, purchasers, that is no concern of the respondent. It is his duty to protect the lunatics—beyond that it ends.

The House of Lords ordered and adjudged, 'that the appeal 'be dismissed, and the interlocutors complained of be affirmed.'

LORD CHANCELLOR.—My Lords, There is another case, that of Eaton v. Murdoch, which was heard some time ago, and which stands for the judgment of your Lordships. I have considered every thing that was advanced at your Lordships' Bar, and have read over the papers several times with the greatest attention; and having done so, I see no reason whatever to differ from the judgment pronounced by the Court below. The appellants were nominated cautioners for the management and intromissions of a Mr John Aitken, who was appointed curator bonis to a lunatic; and they entered into bonds accordingly. Property, which came to the hands of Aitken, having been misapplied by him, an action was brought against the sureties in the bond. The Court below thought that action well sustained; and after having very maturely weighed the decision, and the grounds on which it proceeded, I see no reason whatever to differ from the judgment which has been pronounced. I would therefore move your Lordships that the judgments be affirmed.

Appellants' Authorities.—University of Glasgow, Nov. 18. 1790, (2104.); Elton Hammond, June 24. 1812, (F. C.); Houston's Executors, March 4. 1820; A. of S. Feb. 13. 1730; Vere, Feb. 29. 1804, (16,389.); Henderson, Jan. 1803, (14,982.)

Respondent's Authority.—Mackay, March 9. 1796, (16,384.)

RICHARDSON and CONNELL—SPOTTISWOODE and ROBERTSON,—Solicitors.

THOMAS HARVIE of Westthorn, Appellant.—*Dean of Faculty Moncreiff—Brougham.* No. 12.

GEORGE RODGERS, and Others, Respondents.—*Adam—Keay.*

Prescription—Road—Presumption.—The uninterrupted use and enjoyment of a foot-path by adjacent feuars, &c. as far back as the memory of man could extend, through the property of a party infeft under titles which did not mention any such path prior to 1789, having been proved; and the proprietor having proved a series of interruptions from and after 1789, but which were resisted, and the use of the foot-path continued; and the Judge having directed the jury, 1. That, from the evidence of uninterrupted possession prior to 1789, they were entitled in law to presume forty years' possession; and, 2. That the interruptions by the proprietor were not sufficient to defeat the right acquired by such possession;—Held, (affirming the judgment of the Court of Session), That the direction was correct.

July 8. 1828.

2D DIVISION. Jury Court.

THE estate of Westthorn, belonging to Harvie, was described in his titles as 'bounded by the river Clyde on the east, south, 'and south-west; on the west by the paling,' &c. The city of Glasgow lies on the bank of the river, a few miles lower down, and the village of Carmyle a short distance above. Harvie having erected stone walls, surmounted with iron railings, across his property, and running into the bed of the river, so as to prevent all passage by its banks, Rodgers and others, feuars, residenters, and proprietors in the neighbourhood, raised against him an action of declarator, stating, that the slip of ground extending along the north bank of the Clyde from the Green of Glasgow to Carmyle (of course including Harvie's property midway, touching the river), had remained free and unclosed past the memory of man; that through its whole extent a path runs along the bank, and for time immemorial had been resorted to and used and enjoyed by them, and other inhabitants of the neighbourhood, and their predecessors, without challenge, molestation, or interruption; and concluding that it should be found and declared, that the pursuers, inhabitants of and feuars and proprietors of the neighbourhood, have, by themselves, their pre-

July 8. 1828. decessors and authors, exercised and enjoyed the free, immemorial, and uninterrupted right and privilege above mentioned, and that they have good and undoubted right and title, at all times, and on all occasions, to resort to the said piece of ground, and road or path, and there to exercise the privilege and enjoy the comfort of a free passage along the same, and of walking thereon for any lawful purpose, according to immemorial usage and custom, and that the right and privilege should be reserved entire, as it has been in time past; and farther, that the defender neither has nor had any right or title to encroach or innovate on this piece of ground, and road or path, or to obstruct the free passage thereof, according to use and wont; that he should be ordained to desist and cease from the like practice in future, and should remove the obstruction and impediments already raised, and be prohibited and discharged from using the said piece of ground, road or path, to the prejudice or injury of the said right of passage, according to use and wont, or from molesting or interrupting the pursuers, &c.

After considerable discussion before the Lord Ordinary, the pursuers averred and offered to prove, that for more than a century, at least for forty years and upwards, prior to the 1st of March 1822, or thereabouts, there existed a distinct and definite foot-road, leading from the Green of Glasgow along the banks of the river Clyde to the village of Carmyle, and separated from the adjoining lands by ditches and other fences; and that this road had, for the period above-mentioned, been constantly used and enjoyed without interruption or restraint by the public at large, and more particularly by the inhabitants of Glasgow and the neighbourhood. Harvie denied that the inhabitants of the neighbourhood, or the public at large, had enjoyed or exercised the right of foot-way claimed; and alleged that the nature of the ground was incompatible with such uses, and that if any person encroached on the property they were turned off. This issue was then sent to the Jury Court:—'Whether, for forty years 'and upwards prior to the months of March, April, and May '1822, there existed a public foot-path or foot-road along the 'right bank of the river Clyde, from the city of Glasgow, from 'the place called the Green, to the village of Carmyle, situated 'on the said bank of the said river?' The jury, in respect of the matters proven before them, found for the pursuer. Harvie then obtained a rule to shew cause in the Jury Court to have the verdict set aside, and a new trial granted, founding his application inter alia upon the direction of the presiding Judge at the trial, as a misdirection in point of law. But the Court

having dismissed the rule, and thereby confirmed the direction, Harvie tendered a bill of exceptions, reciting the evidence at full length, but which, in substance, was to this effect:—On the part of Rodgers and others it was proved, by aged witnesses, that for at least thirty-four years prior to 1789, the public had enjoyed the free and uninterrupted use of a foot-path along the banks of the Clyde, from Glasgow to Carmyle; that the proprietors through whose ground it ran, in enclosing their grounds, left openings or styles in the fences; and that, although occasionally interrupted, the possession had been continued till the date of the action. On the other hand, Harvie proved, that in 1789, and on several subsequent occasions, his predecessors, and the other proprietors on the banks of the Clyde, had erected fences, sunk ditches, and raised other obstacles to prevent the public going along the path; but it appeared that the fences had been pulled down or burned, the ditches either filled up at the place where the foot-path ran, or made otherwise passable; that the proprietors and the public had had a continual dispute on the matter; and that on the occasion of Harvie erecting a stone wall with iron rails in 1822, the contest came to such a height, that the public peace was disturbed, and the Sheriff was obliged to interfere, and to resort to the aid of the military force. The bill of exceptions then bore, 'That the Lord Chief Commissioner did then and there observe to the said jury, that the foot-path in question was not a private but public foot-path, as stated in the issues, from the city of Glasgow to the village of Carmyle; and if the jury believed the witnesses on the part of the pursuers, the public appeared to have been in possession of, and in the habit of using such foot-path, for a long period of time, more than forty years; and that there was, on the part of the defender, no evidence to establish an interruption till within the forty years: That in that case, and upon the whole evidence, the truth of which they, the jury, were to weigh and consider, the question was, Whether the interruption, as to which evidence on the part of the defender had been adduced, was sufficient to defeat the right as to which the evidence had been adduced on the part of the pursuers? And the Lord Chief Commissioner did then and there give, as his direction to the jury in point of law, that the interruptions proved were not sufficient to defeat a right in the public to the foot-way in question, which right must, on the evidence for the pursuers, if believed by the jury, be presumed to have been established, by having been used for forty years and up-

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July 8. 1828. 'wards, from the date of the interruption, as stated in the issue: 'That such right in the public could only be defeated by an 'interruption acquiesced in, and submitted to; but that, accord- 'ing to the evidence, if satisfactory to the jury, the interruptions 'had not been submitted to, but had been resisted; and the jury 'aforesaid did then and there deliver their verdict for the pur- 'suers.' The Counsel for the defender then contended, 'That 'the Lord Chief Commissioner, instead of the direction on the 'law given by him as aforesaid, should have directed the said 'jury to have found a verdict for the defender, by directing 'them,—That the defender having produced an express title to 'the lands of Westthorn, bearing that these lands were bounded 'by the river Clyde, subject to no qualification of any right of 'road or public path-way in the line or direction founded on, the 'only way in which it could be established that the public had 'acquired a right to a public road through his property, was by 'producing positive evidence of the peaceable and uninterrupted 'use and possession of such a public road for forty years; and 'that a proof of partial possession, resisted and interrupted 'via facti by the proprietors, could not make out such a case of 'peaceable possession, acquiesced in by the proprietors: That 'the only right by titles of property being in the defender, it was 'not necessary, in order to defeat any assumed right by indivi- 'duals of the public, to prove that actual interruptions made by 'the proprietors had been acquiesced in, and submitted to by 'all the public; and that the proof of peaceable possession by 'the public, and acquiescence by the proprietor, was essentially 'necessary to distinguish a prescriptive right to a public road 'from a case of attempted usurpation on the one part, and the 'assertion of the right of property on the other.'

The bill of exceptions having been presented to the Court of Session, their Lordships, on the 10th July 1827, 'having heard 'Counsel for the parties, disallowed the exception, declared the 'verdict final and conclusive in terms of the statute, and found 'expenses due.'*

Harvie appealed.

Appellant.—A proof of usage of right of way, uninterrupted for forty years, is equivalent to a proof of immemorial usage, whether the public or an individual claims: The only difference

* 5. Shaw and Dunlop, No. 454.

is, that the individual must have some title with which to connect the usage, whereas the public can have no title but what the usage creates. But the proof itself is the same. The uninterrupted acquiescence for forty years by the proprietor of the ground, is regarded as an acknowledgment of the right claimed. But then the possession of the right of way must be peaceable and continued, without any lawful interruption within the forty years; and any act by which a proprietor uses or asserts his right, as in opposition to the right of way, is an interruption. If such be done, viz. putting up fences, chasing off intruders, this (particularly in a case with the public) will prevent the acquisition of the servitude. The issue sent to the jury was not calculated to bring out the real point between the parties; and even on it the jury was instructed, not to consider whether there had been forty years' acquiescence by the appellant, but whether his acts of interruption had been acquiesced in by the public; thus reversing the rule of law which regulates questions of this kind. Instead of the respondents being obliged to prove, that they had possessed the right of way for forty years uninterruptedly, the appellant was called on to shew that, by his acts, or the acts of other proprietors of the ground over which the right was claimed, he had deprived the public of the supposed right. Even if the respondents' evidence were sufficient to go before the jury, as applicable to the point at issue, the appellant's evidence was most important, as being incompatible with the peaceful uninterrupted enjoyment of the right of way, on which the whole of the respondents' case rested; and yet the Judge's charge had substantially the effect of withdrawing this evidence, led by the appellant, from the consideration of the jury; and thus it is impossible to doubt that a verdict was drawn from the jury, different from what it would have been had the direction complained of not been given. The evidence on both sides should have been considered in mass, and not divided. Although it was, no doubt, quite proper to lead evidence as far back as possible, this must not be taken by itself, but in conjunction with the evidence of possession down to the date specified; and then the jury ought to have been directed to inquire, whether there had been a peaceable possession for forty years retro from that date. It was impossible to maintain, that if there had been no possession during the forty years immediately previous to that date, the respondents would have done enough by shewing, that for the forty years before these forty years they had possessed and enjoyed the right of way. Undisturbed interruption is not legal or intel-

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July 8. 1828. ligible language; and besides, the pretended use of the road was little more than the straying of idle people from Glasgow over ground not enclosed, and by a much more circuitous path than the highway.

Respondent.—A right of way is inter regalia, and the soil over which it extends is the property of the Crown. The question which has arisen, is not whether the solum had once been the property of the appellant, nor whether a servitude had been created by occupancy in favour of the public; but whether, for forty years, or time immemorial, a public foot-path has existed? Now the respondents proved occupation for a period beyond the time ordinarily falling within the memory of man; and there was no evidence that at any period, however remote, there had been no way. In these circumstances, the direction of the Judge was quite correct. It must be taken as a whole, and not in parts. Before the exception can stand, the appellant must make out, not only that there was a direction calculated to mislead, but that it actually did mislead the jury. If it was right in its result, or if it was such as did not fetter the jury, but left them to form their verdict according to their own view of the evidence, it is sufficient. Besides, the Judge's observations on the evidence, or the effect of the evidence, are not the proper subject of a complaint by bill of exceptions. They may be founded on as a reason for a new trial: But that was applied for, and refused. The only ground for bill of exceptions is, that the Judge has conclusively and erroneously ruled a point of pure law influential in the case. But here the direction truly was the expression of an opinion as to the effect of the evidence. The direction, however, was quite correct. The question in the issue was, whether a public foot-path, in a specified direction, had existed for forty years and upwards? The point correlative to this was, whether there were such interruptions as destroyed, for any space of time, the existence of this public path? But the evidence shewed that the general occupancy of the path never was suspended, and therefore the jury were rightly directed to find in the affirmative of the issue. Still the fact, whether such an interruption had been given to the general occupancy, was left to the Jury to decide upon; and they did so. The law applicable to immemorial possession is quite fixed. If once proved, then you presume retro till the contrary can be shewn; consequently you presume the possession of forty years, or rather much more. Thus the public had a prescriptive right at the date of the first interruption; and unless that interruption was acquiesced in, and

tolerated for forty years, the public have not lost their right. The appellant endeavours to assimilate this case to a claim of servitude. That, however, is obviously an incorrect view; but even if correct, it would not avail him, for a servitude can be acquired by possession for forty years; and the possession here exercised and proved is, in law, equivalent to possession for forty years. It is a still greater error to maintain, that the forty years to be inquired into were the forty years immediately preceding the date specified in the issue; for that would lead to the untenable proposition, that the advantage of a possession for a century could be lost by interruption in the hundredth and first year. It is enough if there were possession for forty years at any one time previous to that date specified; and even if this point were also conceded to the appellant, his case would not be strengthened, for the facts described by the appellant as interruptions are not legally so. The passage was not merely used by idle boys, nor was the ground unenclosed, or the way too circuitous to be used as an access to Glasgow. Besides, these were statements for the jury, and cannot be here founded on. July 8. 1828.

The House of Lords ordered and adjudged, 'that the appeal 'be dismissed, and the interlocutor complained of affirmed, with 'L.100 costs.'

Lord Chancellor.—My Lords, There is a case of Harvie v. Rodgers, argued some time since at your Lordships' Bar, which now stands for judgment. It was a case as to a public right of way on the north bank of the Clyde, from the city of Glasgow to a village of the name of Carmyle. In the course of the proceedings it was directed that an issue should be prepared for the Jury Court. An issue was accordingly prepared in these terms:—'Whether for forty years and 'upwards, prior to the months of March, April, or May 1822, there 'existed a public foot-path or foot-road along the right bank of the river 'Clyde, from the city of Glasgow, from the place called the Green, to 'the village called Carmyle, situated on the said bank of the said 'river?' That issue came on for trial under the direction of the Lord Commissioner of the Jury Court, and a verdict was found for the pursuers, establishing the right of way. An application was made for a new trial, on the ground of a misdirection in point of law. The argument for a new trial was carried on at considerable length, and the Court were finally of opinion that there was no ground for a new trial. Afterwards a bill of exceptions, regularly signed, was tendered by the defender; and the question in point of law, with respect to the direction of the learned Judge, came before the Court of Session, who, after hearing arguments, were of opinion that the direction given by the Lord Commissioner at the trial was perfectly correct. It is from

July 8. 1828. this judgment that the appeal has now been brought for your Lordships' decision. The whole case, therefore, arises upon the bill of exceptions; and I shall state to your Lordships, very shortly, the effect of the evidence on the bill of exceptions, so far as it is necessary to point your Lordships' attention to it, with reference to the direction of the learned Judge who presided at the trial.

It appeared by the evidence of living witnesses, who attended at the trial, that, so far back as seventy years previously to the time of the trial, (I think as far back as the year 1755), this way was used without interruption. There was no evidence whatever of any interruption of the right occurring until the year 1789, thirty-four years subsequent to the beginning of the period to which the evidence related. Not only was there no evidence during that thirty-four years of any interruption of the right, but there was distinct and positive evidence to the contrary. The exercise of the right of way had never, during that period, been at all interrupted; and there were various circumstances which were referred to in evidence for the purpose of confirming that statement, and, among others, that in the fences there were regular stiles placed, in order to facilitate the passage of persons using the way. In the year 1789, for the first time, according to the evidence, this right was attempted to be interrupted. Even with regard to this interruption there was contradictory evidence. It appeared, however, by very clear and distinct evidence, that in the year 1797 an attempt had been made to interrupt the exercise of this right; and from the year 1797 down to the period of the trial, at successive periods, the occupiers of the property, over which the right of way extended, had at different times interrupted the exercise of it; but in no instance whatever had these interruptions been finally successful. They had been always resisted; the fences which had been from time to time erected had been pulled down; and the public had enjoyed the right of way, subject to these occasional interruptions, from the year 1755 down to the period of the trial. It appeared, therefore, that, except the interruption in the year 1789, even supposing that interruption to have been satisfactorily established, (with reference to which there was contradictory evidence), there was no interruption existing at a period so far back as forty years previous to the time of the trial.

Now these are all the facts, or rather the result of the facts, stated upon the bill of exceptions, necessary for the purpose of explaining the direction of the Lord Commissioner. His Lordship's direction was in these terms:—'If the jury believed the witnesses on the part of 'the pursuers, the public appeared to have been in the possession of 'and in the habit of using such foot-path for a long period of time,— 'more than forty years,' (that there is no doubt of); 'and that there was 'on the part of the defender no evidence to establish an interruption 'till within the forty years,' (with respect to that fact also there was no doubt); 'that in that case, and upon the whole evidence, the truth of 'which the jury was to weigh and consider, the question was, Whether

'the interruption, as to which evidence on the part of the defender July 8. 1828.
'had been adduced, was sufficient to defeat the right as to which the
'evidence had been given on the part of the pursuers? And the Lord
'Chief Commissioner did then and there give as his direction to the
'jury in point of law, that the interruptions proved were not sufficient
'to defeat a right in the public to the foot-way in question.' Now pausing here, my Lords, the direction of the Lord Chief Commissioner appears to be perfectly correct, that is, assuming the right of foot-way to have been satisfactorily established by evidence. The interruptions which were proved were not sufficient to defeat such right,—they were occasional interruptions, exercised during a period of about thirty-four or thirty-five years, but always resisted, and effectually resisted. Supposing, therefore, the right of way to have been established, an attempt on the part of the occupiers of the land over which the way ran, from time to time to interrupt that right, but not effectually succeeding in interrupting that right, never can be considered as sufficient to get rid of a right of way once established. So far, therefore, there can be no doubt of the propriety of the direction of the Lord Commissioner. He then went on thus, 'Which right must, on the evidence
'for the pursuers, if believed by the jury, be presumed to have been
'established by having been used for forty years and upwards from
'the date of the interruption as stated in the issue.' Now, my Lords, with respect to that passage some doubt was entertained, and the principal part of the argument bore upon that part of the direction of the learned Judge; but when it is considered with reference to the evidence, it appears to me to be perfectly distinct and intelligible. He tells the jury, that the right must, on the evidence for the pursuer, if that evidence be believed by the jury, be presumed to have been established, by having been used for forty years and upwards from the date of the interruption, that is, previous to the date of the interruption in the manner stated in the issue; for in the issue the attention of the jury is directed to the period of forty years' enjoyment as being a period which is sufficient, if uninterrupted, to establish the right of way.

Now, my Lords, what is the evidence with respect to that part of the case? I shall assume, for the purpose of argument, that the interruption in 1789 was established to be an interruption without any contradictory evidence. I do not mean interruption that was finally successful, for the interruption was resisted; but for thirty-four years previous to that time, this way had been used without any interruption at all, by the acquiescence of the proprietors of the land over which the way ran. That carries back the evidence as far as seventy years,—as far back as the memory of any witness could extend who was examined upon the trial,—as far as it is probable the recollection of any witness could apply to a case of this description; and if thirty-four years of uninterrupted exercise of the right of way were established, it was then competent for the jury to presume, and they ought in point of law to

July 8. 1828. be directed by the learned Judge to presume, from thirty-four years' exercise of a right of way uninterrupted, a previous enjoyment corresponding with the manner in which it had been enjoyed during the thirty-four years. They therefore were entitled from the evidence to presume, that for forty years previous to the year 1789, the date of the first interruption, this right of way had been exercised without any interruption; more particularly from those circumstances stated in the evidence, that there were actually openings made by the proprietors of the land, for the purpose of allowing the free use and enjoyment of that right of way. The case then stood thus:—The learned Judge in substance told the jury, There is evidence, from which you may assume that for a particular period, namely for forty years, this way had been exercised without interruption. If you are of that opinion, then that is, according to the law of Scotland, sufficient to establish a prescriptive right of way; and if that right of way be once established in the manner I have stated, then I tell you in point of law, that subsequent interruptions not acquiesced in cannot defeat the right so acquired. It was contended, and contended strenuously, in argument by Counsel at the Bar, that, according to the law of Scotland, it was necessary to prove forty years' uninterrupted enjoyment down to the period of the trial. But it is quite impossible to maintain a position of that kind, for it would lead to this consequence, that if you were to establish an uninterrupted enjoyment, even for the period of sixty or seventy years, an occupier could at any time defeat that right so enjoyed, by successive obstructions, although those obstructions might be resisted by persons exercising the right of way, unless they thought proper to go into a Court of justice. I apprehend that that cannot be the case. It cannot be the case certainly by the law of England. If the right be once established by clear and distinct evidence of enjoyment, it can be defeated only by distinct evidence of interruptions acquiesced in. There was no interruption here acquiesced in; and therefore I should humbly submit to your Lordships, that the judgment given by the Court below, confirming the judgment of the Jury Court sustaining the direction of the Lord Chief Commissioner upon the trial, ought to be affirmed.

My Lords,—In this case, as it appears to me that the direction of the Judge to the jury was correct; and as there was an application made, in the first instance, for a new trial, on the ground of misdirection in point of law; and as that motion for a new trial was overruled; as the case was afterwards brought in upon a bill of exceptions for the purpose of raising the same question; as the Court of Session was of opinion that there was no ground for the bill of exceptions, and confirmed the direction of the learned Judge; I should conceive that, under such circumstances, your Lordships will be of opinion that this appeal ought to be dismissed with costs.

Appellant's Authorities.—Hamilton, March 5. 1793, (12,824.); 2. Stair, 12. 11.; 3. Ersk. 7. 39.; Kinnaird, Feb. 26. 1662, (14,502.); Nicolson, Nov. 14. 1762, (11,291.); Duke of Roxburgh, June 5. 1713, (10,883.); 1617, c. 12. July 8. 1828.

Respondents' Authorities.—1. Bankton, 3. 4.; 1. Craig, De Feudis, 16. 10.; 2. Ersk. 6. 17.; M'Kenzie, Feb. 15. 1822, (1. Shaw's Appeal Cases, No. 23.); Duff, May 22. 1826, (2. Wilson and Shaw's Appeal Cases, No. 19.); 55. Geo. III. c. 42.; 59. Geo. III. c. 35.; 6. Geo. IV. c. 120.; Tait on Evidence, p. 491.; Montgomery, June 24. 1663, (12,722.); Ker, Feb. 12. 1714, (12,723.); Nicolson, Nov. 14. 1662, (11,291.); Beston, July 13. 1670, (10,912.); 3. Ersk. 7. 38.; Wright, Dec. 11. 1717, (12,268.); Rugby Charity, 11. East, 376.

MONCREIFF, WEBSTER, and THOMPSON—ALEXANDER DOBIE,—Solicitors.

EARL OF KINTORE and Others, Appellants.—*John Campbell—Keay.* No. 13.

J. FORBES and Others, Respondents.—*Spankie–Adam–Lumsden.*

Salmon Fishing—Title to Pursue.—Found, (affirming the judgment of the Court of Session), 1. That stake-nets erected on the proper shore of the sea, are not illegal; and, 2. That proprietors of salmon fishings in an adjacent river, have no title to object to heritors on the sea-coast, who hold a right of fishing by net and coble from the Crown, exercising their right by stake-nets.

FORBES, and other proprietors of land, stretching northward along the sea-shore six or seven miles, from about two miles from the mouth of the river Don in Aberdeenshire, (a river that issues into the ocean without any frith or estuary), held by their title-deeds the right of salmon fishing by net and coble ex adverso of their estates. These fishings they let to tenants, who erected stake-nets in the sea, and caught white fish and salmon. The Earl of Kintore, and other proprietors of the salmon fishings in the river itself, and of the sea fishings at its mouth, challenged these erections, and raised an action of declarator before the Court of Session, concluding that it should be declared, that Forbes, and the other proprietors, had 'no right, by themselves, 'or other persons employed or authorized by them, to erect or 'use the said dams, stake-nets, yairs, or machinery aforesaid, or 'other machinery of the same nature, within the salt water that 'ebbs and flows, or upon the sands and schaulds adjacent thereto:' 'that the defenders should be ordained to demolish them, and pay 'damage for the loss already sustained by these erections; and be 'interdicted from erecting or using in future the machinery fore-'said, or any other machinery of the same nature, within the salt July 11. 1828.

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July 11. 1828. 'water that ebbs and flows adjacent to the said river Don, or 'upon the sands and schaulds within the said water, where they 'were not before, in all time hereafter.' The defenders objected to the pursuers' title to pursue; and, on the merits, maintained that the statutes relied on, as prohibiting these erections, did not apply to stake-nets on the shore of the ocean.

The Lord Ordinary having reported the case to the Court on informations, their Lordships, after a hearing in presence, assoilzied the defenders on the 31st May 1826, 'In respect that the 'stake-nets and machinery complained of are confessedly erected 'and placed in the sea, and not in any river or estuary.' *

The pursuers appealed.

Appellants.—I. *(Title to Pursue).* The appellants have an important interest to put down these stake-nets. Salmon, by a law of nature, return to the river where they were spawned; in their progress they coast the shore, are intercepted by the respondents' erections, and thus the profits of the appellants' fishings in and at the mouth of the river are reduced, if not annihilated.

II. *(Merits).* Fixed machinery, similar in principle to stake-nets, placed in situations within the influence of the tide, was used in Scotland as early as the beginning of the sixteenth century. By degrees it appears to have been abandoned, except on the Solway, where it is protected by statute. When attempted to be revived in the firth of Tay, the erections were challenged and declared illegal. No doubt these stake-nets were in an estuary: But the statutes prohibiting their erection in the mouths of rivers, when properly understood, apply also to the shores of the ocean. These statutes distinguish between fixed machinery in fresh and in salt water. Cruives and yairs in rivers are not in themselves illegal; but the party claiming to erect them must hold a special right to the privilege, and obey the regulations of the statutes enacted for the purpose of allowing the fish free access to the upper part of the sea, and to preserve the fry. But this sort of machinery, and the regulations applicable to it, are not calculated for situations open to the influence of the tide. Accordingly, the prohibitions in the statutes are invariably directed against machinery, under the general denomination of cruives, yairs, &c. set where the

* 4. Shaw and Dunlop, No. 397. where the opinions of the Judges will be found.

sea ebbs and flows, and that whether in the very sea, or elsewhere in which the tide is influential; in 'all manner of watteris,'—in 'omnimodis acquis,' as the statute of Robert I. expresses it;—the object of the Legislature being to protect every kind of fish, whether white or salmon. This is apparent from an attentive comparison of the various statutes on this subject. No doubt, the word 'water' sometimes signifies river, but not always. It is a flexible term, explainable by the subject and the context; and in the statutes clearly means 'sea.' Besides, in several statutes, the word water is not used at 'all.' The allegation, that the law of England prohibits wears (zaires) in rivers, and allows kiddels (open wears) erected on the sea-coast, is of no moment; for the law of England, in a question of Scotch statutory law, must be quite irrelevant. But, independent of the illegality of the erections in question, they are not warranted or covered by the titles of the respondents, who have merely a grant from the Crown to fish with net and coble, and not by stake-nets. July 11. 1828.

Respondents.—I. *(Title to Pursue).* The appellants have no title to sue. They have no right to fish ex adverso of the respondents' land; and if they had a title, they have no interest, for their fishings have not been diminished; and even if their fishings had become less productive, that could not be traced to the erection of the stake-nets. Neither have they any title to object to the mode in which the respondents exercise their right.

II. *(Merits).* The statutes regulating salmon fishings arose from general and public views, and not merely with reference to private interests. Their object was to protect the fry and unspawned salmon, and therefore secured a free access to the sea. The appellants' whole argument rests on the fallacy that 'water' signifies ocean. But there is not a single authority for such an assumption. In the statutes, the word uniformly means 'river.' What could be more absurd than to enact prohibitions as to machinery placed where 'the sea ebbs and flows,' when round the island there is no spot where it does not ebb and flow? In the statute of King Robert, the expression is 'in omnibus aquis;' and even if 'in omnimodis acquis' were the true reading, that would only mean, 'rivers of all sorts and sizes.' There is something preposterous in the appellants saying that they have a right of embargo on all the proprietors on the sea-coast. According to their argument, that embargo would extend to a proprietor a mile from the mouth of the river, or even to a party whose lands were a hundred miles off. The law of England supports the respondents' views. As to the separate ground of appeal, the respondents' titles

July 11. 1828. unquestionably give them a right to fish ex adverso of their lands in the way they see proper.

The House of Lords ordered and adjudged, that the interlocutors complained of be affirmed, and the appeal dismissed.

LORD CHANCELLOR.—My Lords, There is a case of the Earl of Kintore against Forbes and others, which was argued some time back at your Lordships' Bar,—a case of very considerable importance in point of value, and important also as relating to a public question. The appellants in this case are owners of fisheries in the river Don in Scotland. The respondents are owners of the property along the sea-coast, not far from the mouth of the river Don. The property of Mr Forbes, who is one of the respondents, lies about two miles from the river Don. General Gordon Cumming Skene, I think, has property contiguous to that of Mr Forbes. Mr Forbes's property is beyond that of General Gordon Cumming Skene;—in fact, the property altogether comprises about seven miles, commencing at a part about two miles from the mouth of the river Don, their property being on the sea-shore, for the purpose of catching salmon among other fish. The proprietors of the fisheries of the river Don have complained of this as being an injury to the fishery.

The question is, Whether persons occupying property on the sea-coast have, by the law of Scotland, a right, provided they have a right to fish for salmon, to place stake-nets for the purpose of fishing. This depends on the construction of certain Acts of Parliament passed in Scotland at a very early period, and continued down for many years; and it is proper I should state to your Lordships, in the first instance, that which is not disputed. It is not denied that persons are entitled by the law of Scotland, to place cruives and other machinery in rivers above the point the tide flows, under certain circumstances, and under certain limitations and restrictions as to the manner in which that machinery is to be used, as to the construction of the machinery, and as to the time and period for which it is to be used. What I have stated relates to those parts of rivers which are above the point to which the tide flows. No persons, by the law of Scotland, are entitled in those parts of the river where the tide flows, to place machinery of this description.

The question came on in the year 1816, with respect to the river Tay, before the Court of Session, and afterwards came by appeal to this House. The river Tay terminates in a firth or arm of the sea; and the question was agitated in the Courts of Scotland, whether or not, consistently with those Acts of Parliament, and by the law of Scotland, stake-nets could be put in the river Tay? or rather, I should say, in the waters of the firth of the Tay, consistently with the Acts of Parliament to which I have referred? The Court of Session in Scotland was of opinion, that the Acts of Parliament prohibited absolutely the placing of machinery of this description in that part of the water or firth of

Tay. The case then came to this House, and your Lordships affirmed the decision of the Court of Session; but in the argument that took place upon that subject, and finally in the judgment of your Lordships, care was taken not to decide the question with respect to the right of placing stake-nets on the sea-coast; and therefore the question between those parties who are the parties to this appeal came, on the present occasion for the first time, unfettered before the Court of Session in Scotland. July 11. 1828.

My Lords,—The case was argued at great length, and with very great minuteness and intelligence, in the Court below. It came up to your Lordships' House, and was argued very minutely, and with great ability, at your Lordships' Bar. The Court of Session was of opinion that those Acts of Parliament did not apply to the sea-coast; and the question for your Lordships' consideration will be, whether the judgment of the Court of Session in that respect be, or be not correct. Now, if your Lordships have adverted to the papers upon your table, you will have found there all the Acts of Parliament set out upon which this question principally depends; you will have found the case argued on both sides in those papers, with respect to the construction of those Acts of Parliament; and it is unnecessary for me therefore to detain your Lordships by going minutely through them. I will only state, that, as far as relates to the earlier of those Acts of Parliament, the language appears to be so clear and so distinct, as not to admit of any doubt with respect to the construction of them.

The first statute that was referred to was passed in the reign of Robert the First, as far back as the year 1318. I think it is quite obvious, upon the language and construction of that Act of Parliament, that it was never intended to apply to the sea-coast. It is very short,—the words are these:—'Item ordinatum est et assensum quod omnes 'illi qui habent croias vel piscarias vel stagna aut molendina in aquis 'ubi ascendit mare et se retrahit et ubi salmunculi vel smolti seu fria 'alterius generis piscium maris vel aquæ dulcis descendunt et ascen-'dunt tales croiæ et machinæ infrapositæ sint ad minus de mensura 'duorum pollicum in longitudine et trium pollicum et latitudinæ ita 'quod nulla fria piscium impediatur ascendendo vel descendendo 'secundum quod libere possint ascendere et descendere ubique.' It talks of ascending and descending,—that particular expression is repeated two or three times in the Act of Parliament; and it is clear, therefore, that it had reference to streams, or the continuation of streams,—that it had in point of construction no reference whatever to the sea-coast.

My Lords,—The next Act of Parliament was passed about a hundred years afterwards, in the reign of James the First of Scotland. It is in these words:—'It is ordanyt, that all cruives and zaires'—which words, by the judgment of this House, have been interpreted to mean machinery similar to stake-nets—'set in fresh waters, quhair the sea fillis 'and ebbis, the quhilk destroyes the frie of all fisches, be destroyed and

July 11. 1828. ‘ put away for evermair, not again standing ony priviledge and freedome ‘ given in the contrairie, under the pain of ane hundreth shillinges; and ‘ they that hes cruives in fresh waters, that they gar keepe the lawes ‘ anentes Satterdies slop and suffer them not to stande in forbidden time, ‘ under the said paine; and that ilk heck of the foresaides cruives be three ‘ inche wide, as the aulde statute requires.’ It speaks, therefore, first of fresh water, and it speaks also of fresh water ‘ quhair the sea fillis ‘ and ebbis,’ evidently denoting rivers, and channels similar to rivers. It has been said, that the word ‘ fresh’ may possibly be a mistake; that we have not the original record of this Act of Parliament, and that the word ‘ fresh’ may have been introduced; because, in reciting this Act of Parliament in a subsequent Act, the word ‘ fresh’ is omitted; but still the words ‘ water quhair the sea fillis and ebbis’ are retained.

Without troubling your Lordships with going through other Acts, I think I am justified, upon the terms of this Act, in repeating that which I before stated to your Lordships, that in the earlier Acts it is perfectly clear that they do not in their terms embrace the sea-coast. Certainly, when we come to advert to Acts of a later period, the language is more equivocal and more general; but taking the later Acts in connexion with the earlier Acts, and construing the whole subject together, construing one by the other, I think I am justified in recommending to your Lordships to come to the conclusion, that the whole body of the Acts, taken together, refer not to the sea-coast, but to rivers, and to continuations of rivers; and therefore I should recommend to your Lordships to confirm the judgment of the Court, as far as relates to the construction of those Acts of Parliament.

In the case to which I have referred, of Dalgleish v. the Duke of Athole, with respect to the waters of the firth of Tay, when your Lordships come to look at that particular case, and to apply the language of the particular Acts of Parliament to which I have referred to that case, the construction which the Court of Session have put upon them now is perfectly consistent with the construction the Court of Session put upon the Acts in that former case, and to the construction which this House, when the case came under the review of this House, put upon those Acts.

My Lords,—It is remarkable also, that the writers on the Scotch law, I mean Bankton, Erskine, and Lord Stair, in referring to those Acts of Parliament, do not in any instance apply them to the sea-coast,—they speak of the prohibition as applicable to rivers, and to rivers only. I am not insensible of the argument which was urged at the Bar, that the attention of those writers was not directed to the question precisely as it is now raised; but it is impossible to suppose that those learned writers, in writing their institutional works, and adverting to those particular Acts of Parliament, should not have taken the pains to read them; and it is impossible to suppose, that if they had considered the interpretation of them as extending to the sea-coast, they would have expressed themselves in the limited way in

which they have expressed themselves, confining themselves to rivers, and to rivers only. July 11. 1828.

My Lords,—The case at your Lordships' Bar was also argued upon another principle, which is alluded to in the papers now upon your Lordships' table—the papers sent up from Scotland; namely, that even independently of the construction of these Acts of Parliament, the owners of the fisheries in the Don would have a right to complain of the erection of these works on the principles of the common law. Now, although that point was glanced at in the Court below, it does not appear to have been seriously argued before the Court of Session; and at your Lordships' Bar it was argued by one of the Counsel, not, I think, the Counsel from the northern part of the kingdom, but by an English Counsel, arguing it upon English principles, and citing English cases, most of which I have looked at with considerable attention, but which, when they come to be sifted and examined, appear to me to have no bearing whatever upon the present question. I think, therefore, that if your Lordships are satisfied upon my representation as to the interpretation of these Acts of Parliament, that they are not to be considered as extending to the sea-coast, the position of this question cannot be at all altered by any reference to the principle of the common law, either as applicable to Scotland or England.

My Lords,—Another point has been insisted upon in the papers, and also at the Bar; but it does not appear to me to be entitled to much attention. It is said, that the proprietors of these fisheries on the sea-coast have no right, by the terms of their grant, to fish in this manner; that they are entitled only to fish with what is called a net and coble; and that, having taken upon themselves to fish in a different mode, the proprietors of the fisheries in the river Don have a right to complain of it, and on that ground to sustain this suit. My Lords, I apprehend that is quite a mistake; these persons became proprietors of fisheries on the coast originally by grant from the Crown; and if their grants are so limited, that in point of law (upon which I do not wish at present to pronounce any opinion) they are not entitled to fish in the manner described, namely, by the use of stake-nets, that is a question between them and the Crown;—the Crown may have a right to complain that the exercise of the right conveyed by the Crown has, in that instance, been exceeded; and possibly, under such circumstances, the Crown might, by its public officer, institute some proceeding against them; upon which, however, I wish carefully to abstain from expressing any opinion; but the proprietors of the fisheries on the Don have nothing to do with that. The question with respect to the proprietors of the fisheries on the Don is, Whether they have a right, by the existing law, to complain, that persons who possess property on the sea-coast, and have a right of fishery on the sea-coast as extensive as the Crown can grant, are entitled to fish by means of stake-nets; and whether they can make out that the laws of Scotland prohibit, under such circumstances, where the sea ebbs and flows, the use of machinery of that description? Now I apprehend that, looking

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at these Acts of Parliament, they do not apply to fisheries on the sea-coast, and that the proprietors of fisheries on the Don have no right to maintain this suit. I should recommend to your Lordships, under these circumstances, that the judgment of the Court below be affirmed.

Appellants' Authorities.—(*Title.*)—Colquhoun, July 6. 1804, (14,283.); Kinnoul, Jan. 26. 1802, (14,301.); Athole, March 7. 1812, (Fac. Coll.); Hamilton, March 5. 1793, (12,824.); Braid, Jan. 24. 1800, (No. 2. App. Prop.)——(*Merits.*)—Kinnoul, (supra); Athole, (supra, and Dow's Reports, vol. v. p. 291.); Leslie, June 29. 1593, (14,249.); Gairlies, July 30. 1605, (14,246.); Magistrates of Inverness, Jan. 27. 1776, (14,257).

Respondents' Authorities.—Boece, fol. 5. edit. 1574; Discrittione del regno di Scotia, p. 17.—(*Title.*)—Coble Fishers of Don, Feb. 10. 1693, (14,287.); Colquhoun, July 6. 1804, (14,283.); Athole, March 7. 1812, (Fac. Coll. and Buchanan's 'Reports, p. 263. and 300.); Grotius de Jure Belli, lib. 11. c. 2. § 3.; Puffendorf, lib. 4. c. 5.; Dig. 1. lib. 47. tit. 10.——(*Merits.*)—Balfour's Pract. p. 544.; Rhymer's Fœdera, tom. 7. p. 246.; tom. 8. p. 271. 551.; Bellend. Descrip. de Alb. c. 1.; Spalding's Troubles, 1. 60.; 2. Stair, 3. 70.; 2. Bank. 3. 8.; 2. Erak. 6. 15.; Mag. Chart. c. 23.; 12. Edw. 42. c. 7.; 1705, c. 2. Queen Anne.

Statutes relied on by both Parties.—Alex. II. c. 16. (or William the Lion); Rob. I. c. 12.; 1424, c. 11. and 12.; 1427, c. 6.; 1429, c. 131. (c. 22. new edit.); 1457, c. 86. (c. 33. 34. new edit.); 1469, c. 38. (c. 13. new edit.); 1477, c. 73. (1478, c. 6. new edit.); 1488, c. 16.; 1489, c. 15.; 1535, c. 17.; 1563, c. 3.; 1579, c. 89.; 1581, c. 111.; 1685, c. 20.; 3. Jac. I. c. 12.

A. M'CRAE—RICHARDSON and CONNELL,—Solicitors.

No. 14.

MANNERS and MILLER, and Others, Appellants.
Dr Lushington—Keay.

The KING'S Printers, (Sir D. BLAIR, and Others), Respondents.
Sugden—A. Bell.

G. BUCHAN, and Others, Appellants.—*Dr Lushington—Keay.*

OFFICERS OF STATE, and The KING'S Printers, Respondents.
Att.-Gen. (Wetherell)—Sol.-Gen. (Tindal)—Sugden—A. Bell.

Literary Property—King—King's Printer.—Held, 1. (affirming the judgment of the Court of Session), That the right of printing Bibles, and certain other books, (enumerated in the patent granted by the Crown to the King's printers in Scotland), and of prohibiting their importation, belongs exclusively to the King, as part of the royal prerogative in Scotland, and, by virtue of his patent, to the printers appointed by him: And, 2. (reversing the judgment), That the privilege and prohibition extended to the 'Book of Common Prayer,' as well as to the other books mentioned in the patent.

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1ST DIVISION.
Lord Meadowbank.

IN 1785, the King, by a commission or letters patent under the Union Seal, after narrating a former grant of the office of King's printer, nominated and appointed James Hunter Blair and John Bruce, their heirs and assignees, for forty-one years,

'solos et unicos nostros archityographos, in illa parte regni 'nostri Magnæ Britanniæ Scotia vocata; idque pro spatio qua- 'draginta unius annorum, computando ab et post expirationem 'diplomatis, pro præsenti existentis, præfato Alexandro Kincaid, 'pro simili spatio quadraginta unius annorum concessi; cum 'plena potestate ipsis Jacobo Hunter Blair, et Joanni Bruce, 'conjunctim, eorumque hæredibus, assignatis, seu substitutis, 'antedictis, præfato munere et officio, durante spatio antedicto, 'utendi, exercendi, et gaudendi, cum omnibus proficuis, emolu- 'mentis, immunitatibus, exemptionibus, et privilegiis quibus- 'cunque eidem spectantibus, in quantum cum articulis Unionis, 'legibusque Magnæ Britanniæ nunc existentibus, congruunt: 'Et speciatim, solum et unicum privilegium imprimendi, in 'Scotia, Biblia Sacra, Nova Testamenta, Psalmorum libros, 'libros Precum Communium, Confessiones Fidei, majores et 'minores Catechismos in lingua Anglicana;—necnon solam 'potestatem imprimendi et reimprimendi acta Parliamenta, 'edicta, proclamationes, omnesque alias chartas in usum nos- 'trorum publicorum in Scotia officiorum imprimendas: Et ge- 'neraliter omne quod ibidem publicandum erit, auctoritate re- 'gali, imprimendi et reimprimendi: Prohiben. per præsentes, 'omnes alias personas quascunque, tam nativos quam extraneos, 'imprimere vel reimprimere, seu imprimi seu reimprimi in 'Scotia causare, vel importare seu importari facere in Scotiam, 'a quibusvis locis transmarinis, ullos dict. librorum, et charta- 'rum publicarum supra mentionat. absque licentia vel auctori- 'tate a dict. Jacobo Hunter Blair et Joanne Bruce, hæredibus 'eorum, assignatis, vel substitutis, sub pœna confiscationis om- 'nium talium librorum, chartarumque publicarum, ita impress. 'seu importat. in Scotia; unius eorund. dimidii ad nos, alteri- 'usque in usum dict. Jacobi Hunter Blair et Joannis Bruce, 'eorumque antedict.' July 21. 1828.

For several years the King's printers in England and Scotland had tacitly tolerated the importation into the two kingdoms of books printed by them respectively. But active and rigorous measures having been adopted by the King's printers in England to exclude Scotch Bibles from being introduced into that country, the King's printers in Scotland presented a bill of suspension and interdict against Manners and Miller, booksellers in Edinburgh, and several other booksellers, from importing, selling, or exposing to sale, any of the books contained in the Scotch King's printers' commission, which were not printed at the Scotch King's printers' press, or under their authority. The

July 21. 1828. bill was passed to try the question of right. The Lord Ordinary repelled the reasons of suspension, and refused the interdict; but this interlocutor was, 'in respect of the decision 22d 'May 1790, King's printers *v.* Bell and Bradfute,' recalled, and informations on the whole cause ordered to the Court. Thereafter, on a hearing in presence, the Court (7th March 1823) suspended the letters simpliciter, granted interdict, and decerned.*

Manners and Miller appealed, and maintained, that the letters patent founded on by the respondents did not, by their true meaning and construction, vest in them any right or title to complain of or prevent the free importation from England of Bibles printed by lawful authority there; and this was made manifest by the prohibition being directed only against books brought 'a quibusvis locis transmarinis.' The respondents on the other hand contended, that the words of the patent distinctly conferred the sole right of printing in Scotland the books specified in the commission, and that the verbal criticism was unauthorized.†

Lord Gifford. This question, which is one of very great importance, was discussed fully at your Lordships' Bar; namely, Whether the respondents, under the patent they hold from the Crown in Scotland, conferring upon them the sole right of printing works of this description, have the right to prevent any other person from selling within Scotland, Bibles, and the other books mentioned?

The patent granted to the respondents gives the sole and unlimited privilege of printing within Scotland, Bibles, New Testaments, Psalm Books, Books of Common Prayer, Confessions of Faith, or larger or smaller Catechisms in the English tongue; and your Lordships will perceive, by the decision of the Court, they have granted a suspension and interdict, as applying to all those books, Bibles, New Testaments, Psalm Books, Books of Common Prayer, Confessions of Faith, or larger or smaller Catechisms.

My Lords,—The question mainly agitated at your Lordships' Bar, and I may say the only question discussed at any length,

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* 2. Shaw & Dunlop, No. 253.

† This discussion took place in 1825; and as it was resumed in the question which afterwards arose with Buchan and others, it will be found fully stated there. See post, p. 275.

principally turned upon the language of this patent; and it was contended on the part of the appellants, that although the sole right of printing had been conferred by this patent of 1785, and by a previous patent to other persons, yet that the prohibitory clause in the patent prohibiting the importation of books of this description into Scotland, did not exclude importation from England; and I will tell your Lordships why it was so contended. The prohibition is, 'of all other persons whatsoever, as 'well natives as foreigners, from printing, or causing to be 'printed in Scotland, or importing, or causing to be imported 'into Scotland, from whatsoever places beyond the seas, any of 'the said books and public charters above-mentioned.' The appellants contended, that this prohibition could only apply to parts beyond the seas, and could not be contended to apply to England; and that they had a right to carry to Scotland these books printed by the Universities or by the King's printer in England. In answer to this it was contended, that as the sole right was conferred of printing in Scotland books of this description, that the respondents had the right of preventing any books of that description from being sold in Scotland when printed elsewhere. Your Lordships find, by the decision of the Court of Scotland, that the exclusive right has been confirmed. July 21. 1829.

My Lords,—In the discussion of this case at your Lordships' Bar, the prerogative of the Crown to grant such a monopoly in Scotland was almost conceded by the appellants to the respondents; and I observe in their Case that they say, 'It is not neces-'sary to enter into any curious inquiry in regard to the extent or 'foundation of the royal prerogative in this case. They do not 'dispute that his Majesty, as King of Scotland, has a prerogative 'right to confer upon his printers in that country an exclusive 'right to print all Bibles, New Testaments, and other privileged 'books, and also to prohibit all other persons from printing the 'same within Scotland.'

My Lords,—In considering this case since it was argued, which I have had an opportunity of doing, it appears to me that a very important question in this case has not been fully discussed. I apprehend that the prerogative in this country to grant the right of printing Bibles, New Testaments, &c. belongs to the King, as supreme head of the Church, and he only has a right to the publication of the Book of Common Prayer, and the Liturgy of the Church.

Now your Lordships perceive, that this interdict applies not only to Bibles, New Testaments, Psalm Books, and Books of

July 21. 1828. Common Prayer, which I apprehend mean books of English communion, but Confessions of Faith, (whether the Scotch Confession of Faith or the 39 Articles does not appear), or larger or smaller Catechism, (what catechisms they are does not appear). With respect to some of those works, it may be that the prerogative of the Crown of Scotland may be larger than the prerogative of the Crown of England. But, my Lords, upon looking into the statute of 1690, by which we all know the church government in Scotland was settled, there is this remarkable passage with respect to the Bible:—Section 8. 'The Old Testa-'ment in Hebrew, (which was the native language of the people 'of God of old), and the New Testament in Greek, (which, at 'the time of the writing of it, was most generally known to the 'nation), being immediately inspired by God, and by his singular 'care and providence kept pure in all ages, and therefore authen-'tical, so as in all controversies of religion the church is finally 'to appeal unto them. But because these original tongues are 'not known to all the people of God who have right unto and 'interest in the Scriptures, and are commanded in the fear of 'God to read and search them, therefore they are to be trans-'lated into the vulgar language of every nation unto which they 'come, that the word of God dwelling plentifully in all, they 'may worship him in an acceptable manner, and, through pa-'tience and comfort of the Scriptures, may have hope.'

Now I cannot find, that by any Act of the Crown of Scotland, or the Government of Scotland, there has been any authorized translation of the Bible for the use of the people of Scotland. I have been unable to find such, if any there is. I believe there is none. Then comes the question, Whether, supposing the privilege of the Crown in Scotland was the same as in England, to authorize a translation of the Bible, yet, not having done so, is it competent for the Crown of Scotland to say, you shall not import into Scotland an authorized translation of the Bible by the law of England? With respect to the Book of Common Prayer, if it alludes to the Book of Common Prayer of England, that is no part of the church establishment of Scotland; and has the Crown of Scotland the privilege to say, that that which is the form of the liturgy of the church of England, with which they have nothing to do, shall not be sold in Scotland, unless printed by the King's printer in Scotland? With respect to the Confessions of Faith, there again I say of this Confession of Faith, which I hold in my hand, published in 1690, (which is the Confession of Faith adopted in Scotland, and authorized by the

Crown, the Crown having, as was contended, and not denied, the same sort of privilege in Scotland as to the printing Acts of State, and those particular works which are peculiar to the Church of Scotland;—if there be any such, then I say it may have that privilege; but has it the privilege of prohibiting the printing or selling in Scotland the form of prayer of the Church of England, with which form of prayer they themselves say they have nothing to do in Scotland? So, as to the Psalms, there may be Psalm Books in Scotland which are peculiarly used by the Church of Scotland. Whether they have the power of preventing surreptitious copies of them, I know not. Then, as to the larger or smaller Catechism, it is possible they have such works. These questions appear to me important, and perhaps I ought to take blame to myself for not, at the time of the argument, having suggested these difficulties; but they did not then occur to me, for my attention was turned to the prohibitory clause. A good deal of the argument turned upon a case cited at the Bar, which was said by the appellants to be the converse of this. In that case it was decided, that the King's printer in England had a right to prohibit Bibles printed in Scotland from being circulated in England, because it would be an infringement of the prerogative which conferred the right upon a particular individual; and passages were cited from the judgment pronounced by the very able Lord Chancellor of the present day. He was of opinion that the power was reciprocal. He seemed to admit that the Scotch printer could prevent the English printer from selling the English Bibles, or Book of Common Prayer, in Scotland; but the attention of the Lord Chancellor, and the noble Lord who assisted, was not drawn to the rights of the Church of Scotland; nor do I see any thing in the judgment that warranted the conclusion that he had formed a decisive opinion upon that point, but there are passages that are thought to bear that way. July 21. 1828.

Thinking, as I do, that these points, which have not been discussed, ought to be discussed, I have considered with myself whether, in such a case as this, I ought not to ask your Lordships to remit this case to the Court of Session, in order that these points may be considered; but if I was to do that, I have no doubt your Lordships would have this case again before you. It therefore seems to me, with a view to save expense to the parties, and the delay that would take place, that it would be better for me to ask your Lordships to adjourn the case till the next session of Parliament, and have a farther argument upon

July 21. 1828. this question that affects the privilege of the Crown of Scotland exercised in Scotland over works of this nature. Your Lordships have had an argument directed to the various species of works interdicted by this interlocutor, some of which may, for ought I know, come within the prerogative of the Crown of Scotland, conferring a monopoly upon the printer; but I do not profess to have formed any opinion upon the subject. It is of great importance to consider, whether the prerogative of Scotland can extend to a translation of the Bible, which the Crown of Scotland has never authorized itself. If it has, we shall be informed of it. Is it the translation printed in England? or what translation of the Bible is it which the King's printer in Scotland has the sole privilege of printing? Is it every Bible, or the English translation? I apprehend the principal question in this case will turn mainly upon the printing of the Bible and the New Testament.

Under these circumstances, however reluctant I am, as your Lordships will think I must be, to delay the parties from the judgment they are entitled to at your Lordships' hands, yet, having had time to consider these points, which did not occur to me upon the argument, (my attention being directed to the consideration of the clause upon which the great stress of the argument lay), I should propose not to come to a decision of this case at present, but that the next session of Parliament it should be argued by one Counsel on each side. As it is a question of so much importance, I would not restrict it to that. I should hope, when the discussion takes place, that your Lordships will be assisted by others, who will aid your Lordships in the determination of it, much better than myself. It is a case of great importance to the public, as well as the parties; therefore the result of my recommendation to your Lordships is to delay this judgment till the next session. I do not consider it my duty to ask your Lordships now to come to a determination upon the point till it has been thoroughly discussed at your Lordships' Bar. If I did, it would be the single opinion of the individual addressing you, who has not heard any discussion upon the point. I therefore propose to your Lordships to adjourn this case till the next session.

The case was (29th June 1825) accordingly adjourned. In the mean time, however, the question came under discussion in a similar suspension and interdict presented to the Court of Session by the King's Printers against Buchan and others, mem-

bers of the Edinburgh and Glasgow Bible Societies. The Lord Ordinary in that case, 'in respect of the chargers '(Buchan and others) having failed to point out any distinc-'tion between the matters at issue in the present process of 'suspension, and those determined after the fullest discussion 'and consideration by the First Division of the Court in the 'case of the King's Printers v. Manners and Miller, and other 'booksellers in Edinburgh, and that no documents which appear 'to the Lord Ordinary materially to affect the grounds of that 'judgment are now founded on which were not before the Court 'as aforesaid, or that any allegations in point of fact are 'made by the chargers different from those which were made 'in the said case before the Court,' suspended the letters simpliciter, continued the interdict, and decerned. The Court, on the case being brought under their review, in consideration of the doubt as to the royal prerogative in Scotland expressed in the House of Lords, appointed intimation to be made to the Officers of State, and allowed them to appear for his Majesty's interest; and thereafter (12th May 1826) adhered, except as to the Book of Common Prayer, as to which they altered the Lord Ordinary's interlocutor, and removed the interdict in hoc statu.* July 21. 1828.

Buchan and others appealed, and the King's printers cross appealed in regard to the Book of Common Prayer.

Appellants (in chief).—I. The point of controversy here is, Whether Scotch King's printers are entitled by their grant to prevent the appellants, whether they may be members of the Church of Scotland or of the Church of England, or of other Christian associations, from importing, for distribution or circulation in Scotland, Bibles which have been lawfully printed in England? The respondents contend they have a right to a close, unrestrained, unrivalled monopoly, and maintain it against members of both national Churches, and insist that no man shall possess a Bible in Scotland, unless it shall be printed by the Scotch patentees. This is a very singular grant, if a grant to that effect. But, when properly considered, the letters patent do not, by their words or true meaning, vest this monopoly in the respondents. One part of the letters give a right to print the particular books enumerated, and generally every thing else that is to be published by royal authority; but it is merely the privilege of printing in Scotland. No exclusive privilege is given of

* 4. Shaw and Dunlop, No. 365.

July 21. 1828. selling and vending. Then comes the prohibition against importing. But what is it? It is against importing 'a quibusvis locis 'transmarinis,' which clearly cannot apply to importation from England; and this is made clearer, 1st, By looking to the previous history of the licenses, commissions, or patents, which have at different times been granted to King's printers in Scotland, demonstrating, that the letters patent held by the respondents were framed in the terms in which they stand, upon a deliberate purpose and intention of excluding the pretension of monopoly now set up; and, 2d, By the fact that the demand for interdict is in the face of the established practice for a century, during the whole of which time commissions or letters patent were held in the very same terms.

II. The King may, at a very early period, have taken up the arbitrary prerogative as to the printing and sale of books, which had been at first asserted by the Church. But there are no sound or constitutional grounds for this prerogative; and the right has long since ceased to be considered inter regalia. In England, no doubt, there exists in the Crown a prerogative copyright in the Holy Bible. But that depends upon the joint influence of two principles:—1st, As supreme head of the Church, the King has a right to the publication of all liturgies and books of divine service; and, 2d, As having purchased certain works, and compiled or translated them at the expense of the Crown, he has the right of property in them, and among others in the Holy Bible, the translation of which now in common use was prepared in the reign of James I. at the expense of the Crown, and by the Crown enjoined on the Church. But these principles do not apply to Scotland:—1. In no sense of the word is the King the head of the Church in Scotland. That is a point beyond all dispute. He has no prerogative over the Church, or in church matters, and has no power to prescribe any form of religious worship, or any particular books to be made use of in churches. 2. There can be no fact more certain than that the King, as King of Scotland, has no title by copyright in the English translation of the Bible, on the ground of authorship, or on the ground of having taken on himself, or on the part of the Crown, the expense of composing, and the duty of publishing it; nor was the adoption in Scotland of King James's translation dependent any how on this English prerogative, as applicable to Scotland. Neither is the prerogative necessarily inherent in the Crown as head of the state; nor is it established by usage. There, consequently, was no power in the King to grant

the patent in question, as to works enumerated in it. The prohibition as to the Confession of Faith, Larger and Shorter Catechism, is also manifestly vulnerable, in respect it interferes with the rights and powers of the General Assembly. But whatever may be said by the respondents in support of their patent as to the Bible, &c., they have not a single influential reason for allowing the patent to embrace the Book of Common Prayer. This book does not enter into the ceremonial of the established Church of Scotland. July 21. 1828.

Respondents.—I. The exclusive right of printing the Bible, and other books used in the service of religion, has been vested in the Crown of Scotland ever since the invention of printing, in the same way as in the Crown of England, and for the same reason, viz. that the preservation of the purity of the sacred Scriptures is a matter of too much importance to be intrusted to any authority but that of the executive government. Indeed, anciently, the prerogative of printing books in general appears to have been vested in the Crown of Scotland in the same way as it was vested in the Crown of England, although from the changes that have taken place in society it is now narrowed to the books enumerated in the King's patents. But this prerogative as it now exists does not belong to the Crown in its spiritual, but in its temporal character, as chief civil magistrate of the country. The objection, therefore, that the King is not the head of the Presbyterian Church, is of no force. Neither does this prerogative depend on any purchase made by the Crown. There is no evidence that the Crown of England was at any expense to obtain the present translation. The Crown always exercised the same powers over the other translations of the Bible as over King James's; and there exists no such right at common law as a right of copy either in the Crown or subject.

II. All the books used in the service of religion contained in the respondents' patent have been duly authorized and introduced into public worship in Scotland. Perhaps the right to print the Book of Common Prayer rests upon a footing somewhat different than the right to print the other religious works. But still the principle is the same. Accordingly, all the patentees, from the Revolution to the present time, have enjoyed the exclusive right of printing the Book of Common Prayer.

III. This exclusive right to print and import the Bible, and the other books mentioned in the commission, has been duly and effectually communicated to the respondents. The words of gift are ample and specific, and ought to receive their full force.

July 21. 1828. There is no reason of disfavour to the respondents' claim on the pretended head of monopoly. Any objection of that kind is obviously quite inapplicable. The verbal criticism, that the words 'a quibusvis locis transmarinis' shews that the intention was to withdraw from the patentee the power of prohibiting importation from England, has no foundation if the history of these patents is attended to.* This privilege has not been lost by non-usage, nor could it. Neither have there been any interference whatever with the power or guardianship of the General Assembly.

The House of Lords, in the appeal by Manners and Miller, ordered and adjudged, 'that the interlocutors complained of be 'affirmed;' and in that by Buchan and others, and the cross appeal by the King's printers, ordered and adjudged, 'that the 'said original appeal be, and is hereby dismissed this House, and 'that the several interlocutors there complained of be, and the 'same are hereby affirmed: And it is further ordered and ad-'judged, that the interlocutor of the Lords of Session of the 'First Division, so far as complained of in the said cross appeal, 'be, and the same is hereby reversed.'

LORD CHANCELLOR.—My Lords, In the case of Buchan v. Blair, which was argued at the Bar some time since, I would state to your Lordships the grounds on which I think judgment should be given, and the result to which, in my opinion, your Lordships should come. The principal respondents in the case are the King's printers in Scotland. They hold that office under a patent from the Crown. The appellants are members of certain Bible Societies in Scotland, and have been in the habit of importing Bibles from England; and the material question to be decided in this case, is as to whether or not the King's printers in Scotland have, by virtue of their office and their patent, a right to exclude persons from importing Bibles, and the other works which are contained in the patent, from England? My Lords, two important questions were raised in this case:—One, which was raised, and which was argued at great length in the Court below, and argued

* The patent granted to a predecessor of the respondents had contained a clause prohibiting importation of Bibles, 'infra quemvis locum vel a quovis loco extra illam 'partem regni nostri Magnæ Britanniæ Scotiæ vocat, aut a locis transmarinis;' and the respondents explained, that doubts having been entertained as to the consistency of these grants with the articles of Union, the next patentee retained the words 'aut a 'locis,' &c.; but in place of the former, substituted 'cum omnibus perquisitis, emolu-'mentis, immunitatibus, exemptionibus, et privilegiis quibuscunque eidem spectanti-'bus, in quantum consistunt cum articulis Unionis et legibus Magnæ Britanniæ nunc 'in existentia.' These expressions plainly protected the patentee, whilst, if it were not hostile to the articles of Union, (as has since been decided), they carried the privilege of prohibiting importation of Bibles from England.

very ably at your Lordships' Bar, was as to the right of the Crown to grant a patent, the effect of which shall be to prevent persons in Scotland from importing Bibles, and other works of the description mentioned in the patent, certain religious works, from England; and the second question turned upon the particular construction of the terms of this patent. My Lords, with respect to the first question, it arose out of the case of Manners and Miller v. Blair, which was before your Lordships' House two or three sessions ago; and when that case came on for argument, and was argued at your Lordships' Bar, it occurred to the learned Lord who then presided here—Lord Gifford—that there was a doubt as to the validity of the patent, and as to the power of the King to grant a patent of that description. I do not mean for a moment to suggest that the noble and learned Lord expressed any opinion upon that subject, but that he was desirous, before he decided that question, that that point should be argued at your Lordships' Bar; but which was in fact never argued in the particular case, because the case in which I am about to propose that your Lordships should give judgment, was before the Courts below; and being before the Courts below, the point was raised before the Judges of the Court in Scotland, which had not in fact been raised in the case of Manners and Miller v. Blair; and that case having come before your Lordships upon appeal, it was considered more convenient and proper that the argument, with respect to the validity of the patent, and with respect to the prerogative of the Crown, should be on that particular case than on the case of Manners and Miller; but your Lordships' decision in the one case will be of course governed by the decision in the other. My Lords, in conducting the argument with respect to the prerogative of the Crown, reference was made, and very properly made, to the cases of prerogative in England. For 200 years and more the Kings have, in England, granted patents to their printers here as extensive as the patent we are now considering, and perhaps more extensive, but extensive enough to raise the question we are now considering. In England, the power of the King to grant patents of this description, or to appoint to such an office, has never been seriously questioned. Those patents have from time to time come under the review of our Courts, and the Judges have been called upon to decide upon them. One occurred before Sir Joseph Jekyll so far back as the year 1720, and at different periods, both in the Courts of Equity and also before your Lordships' House during the last century; and I would state it as a point not admitting now of doubt or controversy, that, as far as relates to the office of King's printer in England, the Crown has the prerogative to grant a patent as extensive as that we are now considering,—assuming, for the purpose of argument, that the patent is as extensive as it is contended on the part of the respondents to be. But although the power of the King and his prerogative in England has never been questioned, it has been rested by Judges on different principles. Some Judges are of opinion, that it is to be

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July 21. 1828. founded on the circumstance of the translation of the Bible having been actually paid for by King James, and its having become the property of the Crown, and therefore it has been referred to a species of copyright. Other Judges have referred it to the circumstance of the King of England being the supreme head of the Church of England, and that he is vested with the prerogative with reference to that character. Other Judges have been of opinion, and I confess, for my own part, I am disposed to accede to that opinion, that it is to be referred to another consideration, namely, to the character of the duty imposed upon the chief executive officer of the Government, to superintend the publication, in the first place, of the Acts of the Legislature, and acts of state of that description, and also of those works upon which the established doctrines of our religion are founded,—that it is a duty imposed upon the first executive magistrate, carrying with it a corresponding prerogative. That was the opinion of Lord Camden, as expressed in the case, I think, of Donaldson v. Becket, in most direct and eloquent terms in your Lordships' House: that was the opinion also expressed by Chief-Baron Skinner, in the case of Eyre and Strahan v. Carnan; and I think that may be collected or inferred to be the opinion of a noble and learned Earl, now a member of your Lordships' House, from what fell from that noble and learned Lord in the case of Richardson v. the Universities of Oxford and Cambridge. My Lords, if that be so, if that is the true principle upon which this prerogative is to be rested, it appears to me that all difficulty ceases with respect to the prerogative in Scotland. In Scotland, as well as England, patents of this description have been granted without dispute or contest for more than 200 years. These patents have at different periods been made the subject of suits in the Courts of Scotland, and particularly in the case of Watson v. Baskett in the year 1716 or the year 1717, which cases came afterwards by appeal to the House of Lords. In another case, that of the King's Printers v. Bell and Bradfute, this patent came under the consideration of the Courts of Justice in Scotland; and many other cases may be referred to for the purpose of establishing the same fact: so that we have in Scotland, as well as England, patents granted successively for a period of more than 200 years. These patents have been the subjects of suits. These cases have come to your Lordships' House; and I do not think that, until the doubt was thrown out by the noble and learned Lord to whom I have referred, the late Lord Gifford, the prerogative of the Crown in Scotland was ever called in question. Certainly it never did occur to the very able Counsel who argued the case of Manners and Miller v. Blair in the Court below, seriously to consider or to contest that point. My Lords, in the course of this argument it was assumed, as the basis of a part of an argument, that the prerogative in England depended upon the King's character as supreme head of the Church; and it was argued, that that principle did not apply to Scotland, for that although the King was the supreme head of the Church in England, he was not

the supreme head of the Church in Scotland; and therefore the prerogative might well exist in this part of the island, and yet not exist in Scotland. But, my Lords, I have already stated, that I do not refer the prerogative to the circumstance of the King being, in a spiritual or ecclesiastical sense, the supreme head of the Church in England, but to the kingly character—to his being at the head of the Church and State, and it being his duty to act as guardian and protector of both;—a character he has equally in Scotland and England. And, my Lords, it is perfectly clear, that it is the duty of the King to act this part as the guardian of the Church in Scotland. That is a principle laid down by the authorities in Scotland as much as in England; and by the authority of the statute by which the Reformation was established in Scotland, it is declared to be the duty of the magistrates, and the King as supreme magistrate, to be the protector of the Church; and in the Act of 1690, by which the Presbyterian Church was established, when the Episcopalian Church authority was finally put an end to in Scotland, the same principle is laid down and acknowledged. I think, therefore, this right and prerogative depends upon the King's character as guardian of the Church and guardian of the State, to take care that works of this description are published in a correct and authentic form; and that those arguments upon which the authority rests in this country apply also there. But it was said at the Bar, that in England, as far as relates to the translation of the Holy Bible, we have the translation recognized by public authority, introduced into the service of the Church by public authority; and that the prerogative in England will properly apply to this translation, but that the same principle does not apply there. My Lords, I will say a word on this view of the case with respect to the Bible which was translated in the reign of James the First, and which undisputedly was translated under his sanction and by virtue of his authority. It does not appear that he contributed any thing towards the expense. It does not appear that that translation of the Bible was introduced into the Church by the authority of any Act of Parliament, by the authority of any Act of Convocation, or by proclamation; but undoubtedly it was introduced under the sanction and authority both of the head of the Church, under the sanction of the King of that period,—in what precise way does not appear by evidence. It is probable that, after it was completed, and the heads of the Church were satisfied with it, it was by the authority of the bishops, in their respective dioceses, introduced into general use throughout the kingdom, possibly without any further act for that purpose. But, my Lords, is there any essential difference between the situation of England and Scotland in this respect? I apprehend clearly none; because the same translation has, if not by the actual authority, at least by the sanction of the General Assembly of Scotland, been introduced into their Church, and used there for a period I believe of 150 years; and I understand that use of it in Scotland is as general, and indeed as exclusive and universal, as in England. This translation,

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July 21. 1828. therefore, has been sanctioned in the country by the Church of that country, and by the proper ecclesiastical authorities; and I apprehend that it stands in the same situation, and is guarded by the same privileges, and is in point of law, unless the General Assembly should order otherwise, as compellable to be used in the churches of Scotland as it is in the churches of England. I do not apprehend, therefore, that there is any difficulty in this respect, or that any argument whatever can be founded on the idea, that by some authority in this country that particular translation has been introduced into universal use in our Church, and that no corresponding authority exists in Scotland. I have no doubt there is some authority, at least some implied authority, for the introduction of it in England; and I apprehend there is the same implied authority, the same sanction for it by ecclesiastical authorities in Scotland. It was in consequence of this circumstance, and some doubts arising out of the particular view of the case, that the noble and learned Lord to whom I have referred, was desirous that in this particular view it should be considered again. It does appear to me, therefore, that, as far as relates to the translation of the Holy Scriptures, the case with respect to Scotland is precisely the same as it is with respect to England. But, my Lords, in this patent there are other works noticed. There is the Confession of Faith. My Lords, I find that the Confession of Faith was ratified by the General Assembly in the year 1649; it is therefore a book adopted by the proper ecclesiastical authority in the country. The Larger and the Shorter Catechisms were also ratified by the General Assembly about that same period: and with respect to the metrical version of the Psalms, which is also contained in that patent, that was, as I am informed, prepared by the authority of the General Assembly, and it is used in the churches by authority of that General Assembly. It appears to me, therefore, that these works come within the same principle as the Holy Scriptures, and within the same principle as the Book of Common Prayer in this country.

. . . . . .

A question has been raised with respect to the Book of Common Prayer, which is also contained in this patent; and it is said, that at all events the King could not, in Scotland, confer the exclusive right of printing this work on his printer in Scotland. The Court below entertain some doubt upon this point, and with respect to that in this particular stage of the cause, they have excepted it from the operation of their interdict, without, however, pronouncing any decision upon it. But, my Lords, at one period Episcopacy existed in Scotland. During that time there is no doubt the King's authority applied to the Book of Common Prayer as well as to the other works to which I have referred. It is true that by the Act of Parliament passed in the year 1690 an alteration was made in this respect; and by the effect of that Act of Parliament in 1690 the Presbyterian form of worship became the established form in Scotland, and the Church in that shape became the established Church of Scotland: but, notwithstanding that, those

persons who were members of the Church of England, who were in her communion, were still entitled to the protection of the Crown; there was nothing in those Acts of Parliament to deprive them of that protection; and if the King possessed the prerogative previous to the passing of the Act in 1690, by which he had the exclusive right, by himself or his officers, in Scotland, to publish the Book of Common Prayer, there is nothing in the Act of 1690 to deprive him of that prerogative he had previously enjoyed. It does not appear to me, therefore, in this view of the case, that there is any essential difference between that part of the patent which relates to the Book of Common Prayer, and that which relates to the other works. I think, therefore, my Lords, that with respect to this question, which really never was originally mooted in the Court below, which was only afterwards argued, namely, the general question of the validity of the patent, and only afterwards argued in the second case to which I have now adverted, in consequence of the wish intimated by the noble and learned Lord to whom I have adverted, that your Lordships will have no difficulty in coming to the opinion, that in Scotland, as in England, the King possesses this prerogative, and that he has a right to confer it upon his printer.

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If that be so, my Lords, the only remaining question to which I propose to call your Lordships' attention is, the construction of the patent. I confess I had considerable doubts at first in determining in my own mind what was the proper construction of this patent; but in looking very attentively at the patent, considering the whole bearing of it, and all the facts of the case, those doubts and difficulties have ceased. Without troubling your Lordships by reading the patent, it is in substance this, that those particular individuals are declared to have the sole and exclusive right of printing in Scotland the particular works which are mentioned in it. They are to have the office, and discharge the duties, with all its perquisites, all its emoluments, and all its privileges, as far as it is consistent with the articles of Union. That, my Lords, is the granting part of the patent, to which I shall at present confine my observations. The expression, 'as far as it is consistent with 'the articles of Union,' requires some explanation. A short time before the patent was granted to Baskett in the year 1716, which was in the same terms as this, a patent had been granted to a person of the name of Freebairn, in the year 1711. That patent was, in the granting part of it, as general as this which I have stated; but that contained a prohibition against all persons importing, either from England, or any parts beyond the seas, any of the particular works enumerated in the patent. Some doubts were created in the minds of some persons with respect to the validity of that patent, and it was submitted for the consideration of the Lord Advocate of Scotland, Sir James Stewart; and Sir James Stewart was of opinion that it was contrary to the fourth article of the Union between England and Scotland, to prohibit the im-

July 21. 1838. portation of those works from England. The patent was also referred to the consideration and opinion of Mr Kennedy, who held at that time the office of Solicitor-General of Scotland: he gave an opinion directly the reverse upon this point to that expressed by the Lord Advocate; and it turns out in the result, as appears by the decision in the case of Richardson v. the Universities of Oxford and Cambridge, that the opinion which the Solicitor-General gave was the correct opinion, and that in point of fact it was not contrary to the terms of the article of Union. If that be so, then we are to read this patent precisely as if those words were not contained in the patent; and then it is a question as to the exclusive right of printing these particular works, granted with the office of King's printer, with all the privileges, and with all the emoluments incident to that office. With reference to the previous part of it, the exclusive right of printing works of this description must carry with it the right of excluding all other persons from the participation, from the right of printing them or circulating them. The one is a consequence of the other. If the Crown, by its prerogative, has a right of printing by its officer, it has by its prerogative the right to exclude all others from the enjoyment of the right by importation or otherwise. Therefore, when the King grants the right of printing, he grants the other part, namely, the authority he possesses, or rather, as Lord Eldon has said, the duty consequent upon that authority, the duty of excluding others; and it appears to me, therefore, on looking at the subject in this view, with reference to the granting part of the patent, the patentees have clearly a right to exclude.

But, my Lords, there is a prohibition which follows the granting part of the patent, and it is said the prohibition extends only to parts beyond the seas; and there is a penalty annexed to the prohibition,—all persons are prohibited from importing the specified works from parts beyond the seas, under the penalty of losing those works. But it is no objection to a patent, which conveys a particular power and a particular authority, that there is a prohibition accompanied with a penalty, and that that prohibition accompanied with a penalty is not co-extensive with what is supposed to be the grant. An argument may arise out of the prohibition, for the purpose of construing the grant, and for the purpose of ascertaining what the intention of the granter was; but if the intention of the granter be clear, it does not follow that the grant is at all limited, from the circumstance of there being a prohibition, accompanied with a penalty, which is not co-extensive with the grant.

But, my Lords, no question can arise upon the limitation of the prohibition, because we can understand at once what was the reason of the limited nature of the prohibition. That prohibition arose out of the doubt expressed in the opinion of the Lord Advocate of Scotland. In the granting part of the patent, reference was made to the articles of Union. We grant you all the powers which have been enjoyed by any of your predecessors in this office, as far as they are consistent with

the articles of the Union, but no further. It was supposed that the prohibition of importation from England was contrary to the fourth article of the Union; and therefore, when the party drawing that patent came to the prohibition to be followed by a penalty, he did not choose to carry that prohibition beyond the point, to which it could be with safety and certainty extended. When we find that it has been decided that the articles of the Union do not bear upon this case, we have at once an interpretation of the whole patent, and see the reason for the limited prohibition, and that these words were not intended to have any effect in limiting the patent, unless the articles of the Union required it should be limited. My opinion is, that it is a grant of the authority of the Crown; that the Crown intended to convey all the authority it possessed, and, as Lord Eldon very properly says, there is a duty incident to the authority. The Crown intended to convey its authority, and the Crown intended to convey that authority with a corresponding duty. I therefore cannot bring myself to entertain any serious doubt with respect to the construction of the patent. July 21. 1828.

On these grounds, I should humbly recommend to your Lordships, both with respect to the former objection,—that as to the prerogative of the Crown, and also that with respect to the construction of the patent, —to confirm the opinion expressed after very elaborate argument, and expressed in great detail, and with great ability, by the Judges below. I should propose to your Lordships, that in the case of Buchan v. Blair, the interlocutors complained of by the original appeal should be affirmed, and those complained of by the cross appeal reversed; and as incident to that, I should propose to your Lordships that the judgment in the case of Manners and Miller v. Blair should also be affirmed. The only difference to which it is material to call your Lordships' attention, is that in the case of Manners and Miller v. Blair. The interlocutor includes the Book of Common Prayer; but in consequence of some doubts entertained by the learned Judges having been expressed in the interlocutor in this particular case of Buchan v. Blair, that is made the subject of exception: I should recommend to your Lordships that these interlocutors be affirmed on all points excepting that, and that that interlocutor be reversed.

Will your Lordships allow me in reference to these cases to say, that the effect of the judgment which has been just pronounced will be, that the King's printer in Scotland will stand on the same footing as the King's printer in England. It has been decided, that the King's printer in England has a right to prevent the importation of all books which come from Scotland. I did not mention that as the foundation of your Lordships' judgment,—that was not a ground on which to proceed to such an adjudication; but, at the same time, your Lordships will not regret that the judgment which has been pronounced is followed with consequences so extremely just and equitable.

July 21. 1828. *Appellants' Authorities.*—Rob. App. Ca. 197.; 1551, c. 27.; 1606, c. 1.; 1669, c. 1.; 1689, c. 3.; 1690, c. 1. 5. and 23.; 1700, c. 2.; 1702, c. 3.; 1703, c. 2.; 1707, c. 6.; 4. Burrow, 2381.; 5. Bac. 599.; 1. Burn, Eccl. Law, 373.; King's Printer, May 22. 1790, (8316.); March 7. 1823, (2. Shaw and Dunlop, No. 254.); Mackenzie's Obs. 153.; 2. Blackstone, 27.; 4. Bank. 22. 14.; 1. Erak. 5. 6.

Respondents' Authorities.—1. Mackenzie's Works, vol. i. p. 257.; Anderson, Jan. 5. 1683, (Fountainhall); Rob. App. Ca. 197.; King's Printer v. Bell and Bradfute, May 22. 1790, (8316.); 1. Burn, 348.; 4. Burrow, 2381.; Hinton, July 27. 1773, (8307.); Becket, Feb. 22. 1774.; 5. Bacon, 599.; 1663, c. 27.; 1701, c. 7.; 14. Rymer, 650. 766.; 2. Blackstone, 410.; Acts of Assembly, 1643. 1647, 1648.

MONCREIFF and WEBSTER—RICHARDSON and CONNELL,—Solicitors.

No. 15. Executrix of JOHN VANS AGNEW, of Sheuchan, Appellant and Respondent.—*Adam—Pyper.*

EARL of STAIR, and Others, Respondents and Appellants.
Sol.-Gen. Tindal—A. Bell.

Bona Fides—Expenses.—The House of Lords having, on the 31st of July 1822, found, (reversing a judgment of the Court of Session), That sales made judicially upwards of thirty years previously, under a private statute, of parts of an entailed estate, were null, in respect of certain minor heirs of entail not having been properly brought before the Court; and that one of those heirs, who succeeded to the estate, was entitled to have the lands so sold restored to him; and the Court of Session having found the purchasers were bona fide possessors till the 31st July 1822, and not bound to account for the rents till Martinmas thereafter, and found neither party entitled to expenses;—the House of Lords reversed the judgment to the effect of finding the purchasers accountable for the rents due at Martinmas, without prejudice to any claim they might have for the crops of lands in their own possession reaped prior to that term; and quoad ultra affirmed the judgment.

July 22. 1828.

2D DIVISION. Lord Pitmilly.

THE circumstances out of which the present question arose, are detailed in 1. Shaw's Appeal Cases, No. 50, 51. and 57.

By the judgment of the House of Lords there mentioned, (31st July 1822), it was found, that 'the appellant, (John Vans 'Agnew), on behalf of himself, and the said several other minor 'heirs of entail, is entitled to have the sales, made under the several 'interlocutors aforesaid, reduced, and to have the lands restored 'to him, without prejudice to any question which may be made 'in the further proceedings in the Court of Session touching 'the rents of the entailed estates, and the application thereof, 'during any period of time.' Having then petitioned the Court of Session to apply the judgment, their Lordships altered the

interlocutor complained of, in terms of the judgment of the House of Lords, and remitted to the Lord Ordinary to proceed agreeably to the deliverance; who thereupon reduced the sale, and found 'that Mr Agnew had the only good and undoubted 'right and title to the entailed lands and others libelled, and to 'possess the same; and that the defenders (respondents) had no 'right or title thereto; reserving for discussion the conclusions for 'removing, claim for bygone rents and profits, and the defenders' 'claim for meliorations.' While this inquiry proceeded, the lands were sequestrated, (5th July 1823), and a judicial factor appointed. Thereafter, the Court decerned in the removing, reserving the claim for meliorations, and bygone rents, and objections thereto, and recalled the sequestration. John Vans Agnew having died in the mean time, Anne Robertson sisted herself as his executrix and disponee; and the question as to the bygone rents having been discussed before the Lord Ordinary, his Lordship reported it to the Court on informations. When the case came on to be advised,— July 22. 1823.

**Moncreiff, for the Executrix, stated,*—I attend your Lordships for the representative of Mr Vans Agnew. The only thing I think necessary to observe in this question as to the sequestrated fund is,—

Lord Justice-Clerk.—We take the principal case first—that as to the bygone rents, which is the subject of argument in the informations. Your Lordships will proceed to deliver your opinions on that point.

Lord Justice-Clerk.—In proceeding to decide the only question now before us, which is as to the claim preferred by the late Mr Agnew, and now insisted on by his executrix, for bygone rents of the lands that were subject of discussion here, and which, by judgment of the House of Lords, were ordered to be restored to him, it appears to me to be necessary to pay absolute and scrupulous attention to the judgment of the House of Lords. That will appear clear to all your Lordships. We are, in the first place, to give full effect to that judgment, to follow it up in all its legal consequences to the fullest extent, and 'to pro-'ceed as shall be consistent with this judgment, and shall be 'just.' There cannot be any doubt, that, without that injunc-

* These are the Notes of what took place at the advising, which were laid before the House of Lords, in the correctness of which the appellant stated that both parties concurred.

July 22. 1828. tion in that judgment of the House of Lords, you would not only have been so bound, but would have clearly so decided. (His Lordship then read the judgment).

This was the judgment of the House of Lords; and, if no alteration had been made on it, your Lordships would have had no proceedings to adopt in regard to the question now before us,—Mr Vans Agnew would have received his estate, and the defenders would have been bound to pay over every shilling of the rents. But, in consequence of proceedings that afterwards took place, the judgment was amended. First, on an application made here by the defenders, praying for an opportunity of applying to the House of Lords for a re-hearing on the cause, the proceedings on this judgment of the House of Lords were stayed for a certain period; and then the House of Lords, in March 1823, having heard parties on that matter to a certain extent, pronounced a deliverance. I shall only trouble your Lordships with reading the latter parts of it:—'And it is therefore 'ordered by the Lords Spiritual and Temporal in Parliament 'assembled, that the said judgment be amended, by omitting the 'words "along with the rents, from the period of his accession 'to the entailed estates."' That took away entirely the order for paying over the rents to Vans Agnew. The deliverance then proceeds, 'And inserting instead thereof the words, "without prejudice to any question which may be made in the further 'proceedings in the Court of Session touching the rents of the 'entailed estates, and the application thereof, during any period 'of time."'

Now, in consequence of this amended judgment, the pursuer made application for applying it in this Court. We did apply it accordingly, and we remitted to the Lord Ordinary to follow out the judgment of the House of Lords. The Lord Ordinary, it appears, having heard parties on the subject of the bygone rents, ordered informations to your Lordships; and the informations are now before you which we are to proceed to decide upon.

In the first place, It appears to me, that, paying every attention to the information for the late Mr Agnew, and the information on the part of this executrix given in since his decease, it is absolutely necessary for us to advert to one leading feature which distinguishes the whole of the pursuer's pleading; for I have no difficulty in saying, that if you were persuaded there was any solid foundation for what is pleaded upon, and taken for granted throughout the whole of the pursuer's information, it would, to a certain effect, operate on your views in the question

before us. In the first place, we must make up our mind as to this proposition, whether it is made out, that the whole of the subject of this litigation was bottomed in gross fraud, in wilful and intentional fraud and deception, practised, it is alleged, not only by the late Robert Vans Agnew of Sheuchan, but fraud and deception in which all those parties now before you fully participated, and were, in fact, acting parties, and are therefore, of course, answerable for all the consequences of such fraud? July 22. 1828.

I certainly have read those papers with the utmost attention, and I do confess that I am entirely and thoroughly satisfied, that, instead of that gross fraud and deception which is said to have been practised by the late Robert Vans Agnew being established, it is clear that the pursuer has utterly and totally failed in that allegation. Indeed I have been able to discover nothing tangible or palpable even in point of averment on the subject. There is no condescendence of any such facts as can warrant me to draw the conclusion even of fraud from them;—no step that is stated to have been taken by that gentleman, who has now been long ago in his grave, though viewed by a jaundiced eye, does afford any ground for concluding that there was any fraudulent intention or practice on his part.

I must say for one, I think that the information for the defenders, in regard to this gentleman's allegation, is perfectly satisfactory and conclusive; and as to fraud by Robert Vans Agnew, and intention to impose on the Court, to make a most scandalous and improper use of an Act of the Legislature, and to defraud his family that succeeded to him, there is nothing like proof of that kind before you. Therefore I must lay that entirely out of view.

As to the sequel of this charge, taking for granted and as proved that Robert Vans Agnew entered into the conspiracy, that all the parties who were purchasers are to be held as participating in the conspiracy of fraud and deception, it must at first sight appear to you to be a pretty serious and strong undertaking on the part of the pursuer to make that out. I am also most decidedly of opinion, that none of all the circumstances founded on by the pursuer as proof of that collusion, is in the least deserving of attention.

In the first place, we must be aware how this proceeding took place. An Act of Parliament was passed at the instance of Mr Agnew, praying for authority to sell parts of the estates for payment of debts;—and the Act points out the proceedings that were to be adopted in this Court to bring the proper parties

July 22. 1828. forward. We know what was done. Mr Robert Vans Agnew, the pursuer of the process of declarator and sale following upon the Act of Parliament, no doubt had an interest adverse to the other heirs of entail, if they could make out that no debts could affect the estate; and of course it was proper to have steps taken for bringing those parties forward. I need not trouble you as to what debts did or did not affect the estates. But as to the mode of proceeding,—you recollect that, in the first place, there was a personal citation of the minor heirs,—a citation of Mr Vans Agnew as administrator for the children. There were then proceedings in the Court to a certain extent; and then the Court seeing (which was adverted to by me the other day) the necessity for deciding a question that arose as to the extent of those debts, whether certain debts affected the estate, and came or did not come within the scope of the Act of Parliament, they had memorials before them upon that point. Memorials were ordered; and there was one for the creditors, the persons who wished to have this matter carried on in terms of the Act of Parliament; and another memorial expressly bearing in its title to be for the minor heirs of entail of Barnbarroch and Sheuchan, and for Robert Macqueen, Lord Braxfield, their tutor ad litem. Those memorials were advised by the Court;—their Lordships' judgment was given when they settled the amount of the debts (particularly certain bills, &c.) affecting the entailed estate. And the Court did the duty enjoined in the Act; they proceeded as deliberately as they would do in a ranking and sale,—they adjusted all matters as to the sale of portions of the lands for fair prices,—and they exposed certain lots to public sale.

I think there were four lots first exposed to sale, and you see who the purchasers were;—the Earl of Stair, the Honourable Captain Maitland, the trustees of the late Sir John Hunter Blair, and Mr Johnston Hannay of Torrs. These were the purchasers of the four first lots; and it turns out that, in point of fact, there was a great competition at the sale, some of the lots bringing prices far beyond the upset price. And, after the first proceedings at that roup, the lands were adjudged to those different purchasers.

I just mention, that, if ever there was a case, this appears to me to be one, in which, upon the shewing of the proceedings and circumstances selected by the pursuer himself to establish gross fraud and deception, those proceedings contradict this allegation. Although I think the gentlemen here concerned, the representatives of those purchasers, are well entitled to rely on the respec-

tability of the men of business they had at that time, and the characters of those gentlemen, as a sufficient answer to such suspicion of collusion and of participation in such alleged fraud; yet, independent of their high character, I ask your Lordships, whether or not it can be supposed that men of their reputation in their profession, and in character and talents,—whether you can conceive that it is possible, laying feelings of honesty and character apart, that they could advise their different clients to become purchasers of different lots of this estate, the titles of which they thought were liable to objections now alleged to be apparent on the face of the proceedings? It is said by the pursuer that they appear to be fundamentally erroneous,—that on looking to the proceedings there was no ground for proceeding on this Act of Parliament in the course that was followed, and that the judgment of the House of Lords says it appears 'on the 'face of the proceedings,' that the next substitutes of entail were minors, and were not brought properly before the Court. But were those gentlemen, acting for their different clients, not entitled to look into the productions on the table, to see that all the proceedings were properly conducted? And, with that printed paper lying on the table, revised by all those gentlemen distinguished for knowledge, talents, and integrity, with the tutor ad litem mentioned in the paper sitting in Court at its advising, and not judging in the cause for the reason that he was the tutor ad litem, and those gentlemen witnessing this proceeding,—is it conceivable that men of common understanding, if they entertained the slightest doubt that any possible cavil could attach to those proceedings, would have advised their clients to go to the roup and bid high against one another for those lands? July 22. 1828.

But the case does not rest here. For what cannot be denied by the pursuer, they relied on the purchases as unexceptionably valid—they proceeded to the amelioration of the lands. It is notorious that the lot of one of them, Captain Maitland's lot, happened to be most important in point of contiguity to his mansion-house; and it is well known that he laid out much money on his lot, from the first day he got possession, and rendered it highly valuable, as the pursuers know well now.

But to say that, at the time of the purchases, they knew well that the title was a rotten one, exceeds the extravagance of any proposition ever stated in a Court of law; and those appeals made in the pursuer's papers, to his statement of fraud and circumvention, deception and collusion, appear to me to fall down to the ground at once. Is it possible to suppose those gentlemen did

July 22. 1828. not consider their titles valid, when we all know there is not a school-boy in law who does not know that a title of the kind they possessed is the most sure and valid of all titles? The first lesson he gets in law is, to tell him a decree of sale is the best title a man could receive, from its going through all the forms of the Court, and the title being revised by the whole Judges, instead of parties having the mere assistance of men of business. To say that a decree of sale (and the same formalities were observed here) is not to be relied on, is most absurd—any thing more contrary to any principle of legal knowledge never was alleged.

Therefore, upon those two points, I have explained distinctly, that, as far as I can discover in this paper, the loose averments, and vague statements of the pursuer, do not in the most distant manner bring forward deception and circumvention, fraud and collusion, either to Robert Vans Agnew or to those gentlemen.

That being what I conceive to be the chief circumstance upon which this conclusion, that they were altogether in mala fide, and of course not entitled to the advantages of bona fide possessors, rests,—standing on so baseless a foundation as I have said the statement does, there is little else in the case. For, from that day, down to the steps taken by the late Mr Agnew in bringing his challenge, there was nothing on the face of the earth to bring any doubt to their minds: there was no warning, no certioration as to their going on in the possession and melioration of their different lots; there was nothing till a decree went against them.

I shall just state farther, that there is not the slightest foundation for attaching any imputation of fraud on any of the purchasers of the last lot. It was put up in the same way as the former lots brought to sale, and was bought by Mr Balfour for Mr Agnew. That is matter of every day's practice. If it was exposed to sale, and bought, whether avowed at the time or not to have been for Mr Robert Vans Agnew, makes no difference; it is just as good a sale, and he was entitled to be held as good a bona fide purchaser. After an interval of fourteen years, there was a difference in the value of the lands; and, taking a favourable opportunity, Mr Balfour again exposes the land to sale, and it brings a high price. All those gentlemen, individuals about the town of Stranraer, come forward and purchase,—bid fair and adequate prices,—high prices, they say, but, at all events, fair prices, and they go on with improvements. I have no difficulty in saying, that there is no ground for imputing fraud to Mr

Balfour, who availed himself of his office as trustee for the gentleman for whom he acted. July 22. 1828.

Now, down to Mr Vans Agnew's return from India, there was nothing to alarm those parties. He first took the cases to appeal, availing himself of his minority; and the whole matter afterwards came to this Court again, he having, in the mean time, brought a new action of reduction. You had an opportunity of considering the whole of the proceedings, and not rashly, but after full deliberation, you unanimously considered the first branch of the litigation regarding the debts exactly as your predecessors had done in 1784. In the action of reduction against the present defenders, you assoilzied them from the conclusions of the action, and you found Mr Vans Agnew liable in expenses.

Up to this period, therefore, there was nothing to alarm those purchasers; seeing those very questions, so disposed of, must have had a contrary effect.

Then appeals were taken to the House of Lords, and I have read to you the judgment in this case, and the words on which so much stress is laid in this information, in which a highly elaborate discussion is made of this judgment, and an endeavour to extract a meaning from it to be binding on us in this question.

I pay respect to the judgment of the House of Lords; and looking to the grounds stated, and called to decide as I am on this point, I ask, although they have drawn the conclusion of it appearing 'on the face of the proceedings,' that the pursuer and others were minors; is it supposed to be found out for the first time that they were minors? It was impossible to read a line of the papers without seeing that. The judgment goes on to state, that they were not 'properly brought before the Court,' as enjoined by the Act of Parliament; that therefore 'the sales made 'by the said Court, in such action of declarator and sale, were 'null and void, as against the appellant, and the several other 'minor heirs of entail;' and that Vans Agnew is not to be affected by them, but is entitled to have the sales reduced, and to have the lands restored to him, from the time of his accession to the entailed estates. Considering that judgment any way you please, is not that the simple and precise ground on which it proceeded? The printed proceedings of process, the whole train of argument in regard to those proceedings, every thing apart from a certain little document, which cannot now be found, shews they were brought into the field. The House of Lords proceeded on the ground, that there was no indication of it being on record that a tutor ad litem was regularly appointed for the minors. That

July 22. 1828. is the sum and substance of the judgment of the House of Lords, finding they were not properly brought into the field.

I know well, if the judgment had remained as at first, when it stated, 'along with the rents from the period of his accession 'to the entailed estates,' there would have been no question at all. But I know this, that the House of Lords, at the same time that the forms of the House did not warrant a rehearing as to the whole merits, directly proceeded to amend the judgment, by striking out the whole of those words, and putting it in this shape:—'Without prejudice to any question which may be 'made in the further proceedings in the Court of Session, touch-'ing the rents of the entailed estates, and the application thereof, 'during any period of time.'

Therefore I say, for one, I consider the House of Lords have left that question fairly open to your consideration, to be dealt with according to the principles of the law of Scotland. And, giving effect to the judgment of that House, I do say, I restore the estate to Mr Vans Agnew; and now that he has made his claim as to those rents, the question is, Whether the defenders were bona fide possessors, and therefore are not bound to restore them for any period while their bona fide possession lasted?

I beg leave to say for one, that if ever there was a case in which purchasers of land who had entered into possession were entitled to plead upon bona fides, and to rely on their title as bona fide purchasers, it is in this case. Every one circumstance I have noticed contributed to confirm them in the confident possession of those lands; and, as possessed by them under the best of all titles, they improved the lands, they reaped and consumed the rents; they expended the rents, and they improved the lands by consumption of those rents.

If ever there was a case of bona fides, it is in that before us; and the only question is, If they were bona fide possessors, upon what principle of law or justice can the pursuer ask you to award those rents to him?

We have had too much occasion of late to consider such questions. We had it in the case of the Queensberry leases; and you know the decision in the case of the Duke of Roxburghe against Mr Wauchope, which was in the other Division. Those decisions are so very recent, and they were so uniformly and so unanimously decided, it would be superfluous to do more than mention them, and to say, I see nothing in this case to warrant me to adopt a different line of decision. On the contrary, if ever there was a case in which bona fides might be more strongly urged

than in another, it is in the present case. It is much stronger than many of those cases which have occurred; for not only the bona fide possession applied in the Queensberry cases down to the final judgment of the House of Lords, but there happened to be opposite decisions in the Court of Session. There was good warning therefore; yet the House of Lords solemnly adjudged, that bona fides did not cease till the ink was dry on the final judgment of the House of Lords in 1819. July 22. 1828.

I say, for one, I cannot think the bona fides of those gentlemen ceased till the final and amended judgment of the House of Lords. But I beg to say, for one, you must apply to this case the same principle applied there in the other cases already mentioned, which is, that the proper period for the rents going back, is the first term posterior to that judgment, that is, the term of Martinmas 1822. That is the period at which the pursuer was entitled to have restoration made to him in regard to bygone rents for those purchases made, some of them in 1789, others in 1793 or 1794. I have no conception that, on any principle of law, or equity, or justice, the pursuer can insist for more.

I thought it proper that, in a case of this kind, there should be no doubts left of my view of this most elaborate paper for the pursuer; and I am clearly and decidedly of opinion, that after all the pains that have been taken, he has failed to make out any grounds for a different judgment.

Lord Glenlee.—Why, my Lords, I confess that I have never been able to find out that there was any doubt or difficulty about this question. I cannot conceive that there could be a doubt on the subject. The pursuer makes allegations of fraud in the proceedings with regard to the sales—he alleges there was fraud, both on the part of his predecessor, Robert Vans Agnew, and of the persons who purchased and possessed the lands under the title of those judicial sales. But, in the first place, I entirely agree with your Lordship, that fraud is not made out against the pursuer's father; and, in the next place, there is no evidence of any fraud on the part of Lord Stair and the other purchasers at the sales; and still less, if possible, is there any evidence of fraud on the part of the other defenders, Mr Macneel and others, because they were not the original purchasers at the judicial sales, but purchased subsequently to those sales. The whole circumstances stated and founded upon by the pursuer, even as detailed in Mr Vans Agnew's own paper, make out nothing to establish or countenance at all his charge of mala fides against the defen-

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ders. Therefore, the allegation of fraud can have no effect in this question, nor can I have any conception that there is the least foundation for it.

It appears to me, therefore, that the pursuer is not entitled to the bygone rents which he claims from the defenders. He takes up a notion that the fruits of a subject necessarily go in the nature of an accessory to the property itself. I very well understand that, in a general sense, the proposition is true, that fruits growing go as an accessory to property; but with respect to those fruits that were bona fide reaped and long ago spent by those who possessed the property, I confess I doubt very much whether those fruits should be held as being still accessory to the property. This right to bygone rents depends more upon the right of possession than any thing else; and here the question is, Had the defenders a probable title and right on which they possessed the property and reaped the fruits? You acquire the fruits of property by its actual occupancy. Being in possession of the property, you reap and consume the fruits. No doubt, if, in the way and manner in which you acquired the occupancy, there was a fraud, you are obliged to restore the fruits as well as the property. But fraud implies a consciousness of wrong. Your wrong must be made out against you; and then the restoration of the fruits is rather as a penalty against the person who has got possession fraudulently, than a right following upon the property. That is the true way of considering the matter. And the burden of proving there was virtually and truly mala fides on the part of those who were in occupancy and possession, lies on the person who claims restoration of bygone fruits of the property which have been reaped and consumed.

There is a mistake in saying that there is a difference as to this question, when there is a nullity, and when there is only something capable of reduction. It just depends upon this, whether the nullity is of that kind that no man could fail to be aware of it. Is a man, who did not perceive that sort of nullity on which the sales here were declared void by the House of Lords—is he to be held as having possessed in mala fide? I have no conception of that. To be sure, the House of Peers has found that this was a nullity apparent on the face of the proceedings, and that the Act of Parliament, authorizing the sales, was not properly followed out in the proceedings in regard to the minor substitutes of entail; and the House of Peers, therefore, reduced the sales as null and void, and ordered the lands to be restored to Mr Agnew. But it is a totally different question,

when a claim for restoration of bygone rents and fruits is made, and the bona fides of parties comes to be considered. July 22. 1828.

The rule I always understood in such a case, whether reduction is founded upon an intrinsic or extrinsic nullity, to be, that if there was a reasonable ground for trusting in the title as just and correct, the possession was good. If you were actually aware there was a good objection to the title, you would be in mala fide; but if there was a probabilis causa for maintaining that the title was not null, there was bona fide possession, which is a sufficient defence against a claim for bygone rents.

Very lately we have had some very nice questions as to the effect of errors in sasines; and although we sustained the objection, and found the sasines null, it would be a very hard case that the persons possessed of the sasines should be said to have been in mala fide possession.

In questions as to restoration of bygone rents and fruits, there is no difference in regard to the ground upon which the title is set aside. The point for consideration is, whether the possessors had a consciousness that the title was bad.

In the present case, I think there was some ground for maintaining, that the bona fides of the defenders who purchased and possessed the lands, continued down to the date when the judgment of the House of Peers was amended, in March 1823. I cannot certainly say what hopes lawyers may have had, yet I suspect, when the application was made to this Court to delay proceedings on the judgment of the Court of Appeal pronounced in July 1822, in order that the defenders might have an opportunity of petitioning the House of Lords to rehear the cause, the application which we acceded to was of such a nature, and to such an effect, that the bona fides of the defenders, as to their title of possession, could only be held to have terminated when they found, by the order of the House of Lords in March 1823, that a rehearing of the cause could not be granted by that supreme tribunal. I am not sure that enough had previously passed to make them perfectly aware, that, of necessity, the judgment was final, that their title was reduced, and that they must restore the lands, till the House of Lords refused to rehear the cause.

But we have no occasion to extend the effect of the plea of bona fides farther than the parties themselves ask of us, and that is to the first term of Martinmas after the judgment of the House of Lords pronounced in July 1822.

Lord Pitmilly.—Your Lordship and Lord Glenlee have ex-

July 22. 1828. pressed your opinions in this case so very fully, that nothing remains for me to do, except to say that I concur in every thing stated by your Lordships, both on the facts and on the law.

I am quite satisfied that there is not the slightest ground for a charge of fraud or deception from beginning to end of the transactions, even on the part of Mr Vans, and still less on the part of the defenders.

And next, with regard to the law of the case, I think that this which is now before your Lordships is not one of a difficult kind, and has no resemblance to some of the difficult cases which have been before the Court of late. That being the case, it is quite clear that there is no ground for maintaining that there was any conscientia rei alienæ to constitute mala fides in this case as to fructus percepti, to entitle the pursuer to bygone rents, till from the term of Martinmas ensuing the judgment of the House of Lords. We see all the cases before us in those papers; and, in many of them founded upon, you will observe the defence had been repelled in this Court, and the House of Lords had affirmed the decision of this Court; and yet there it has been held, that the claim for bygone rents could not receive effect till the date of the judgment of the House of Lords. That was decided in some of those cases.

In this case, the decision was in favour of the defenders; and there was not the slightest ground for supposing that there could be a doubt of their title till the decision of the House of Lords.

In a case of this kind, it is not necessary to say more on the law.

Lord Alloway.—I entirely concur in the opinion delivered by all your Lordships, and certainly I would have said nothing more than that I concur in the opinion you have expressed, and so much better expressed than I could; but, in a case of this kind, as every stage of this case has gone to the House of Lords, and I suppose this will also, it may be proper to explain the grounds of my opinion; and I shall endeavour to do so without repeating, as far as I can avoid repeating, what has been said by your Lordships. Perhaps the House of Lords may have better means, by the opinions of the Judges being thus fully given, of knowing the precise grounds on which they proceeded, than they can in any other way.

The point of law that occurs here is very short, and, as I apprehend, very clear. The judgment of the House of Lords has been pronounced, by which the proceedings in the former process of sale are declared null and void,—those sales themselves

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are declared null and void,—and, of course, that the lands must be restored to Mr Vans Agnew. Whether that judgment was well founded or not, it is not our duty or business to inquire. Obedience now is simply our duty. But, in the question now before your Lordships, every point here is reserved for your consideration; and you are bound to lay down the principles of the law of Scotland applicable to the case before you. I beg to observe, therefore, that in any opinion I am giving, I am not calling in question a single principle of the judgment of the House of Lords. I have neither power nor inclination to do so. But when you come to consider this point,—whether those persons who have possessed upon those purchases were in mala fide possession of those lands,—it is impossible not to explain what we understand to be the law of Scotland, and whether those persons were entitled to act as they did or not. My observations on that subject have no other tendency, but are confined to the point under your consideration—are confined to the point of bona fides of the purchasers of the lands, the defenders; and whether they were entitled to retain possession, and therefore cannot be accountable for rents till they were put in a different situation as to bona fides when the judgment of the House of Lords was pronounced.

We are now better acquainted with the principle on which the House of Lords proceeded, from the very acute dissection of that judgment, in all its findings, by the gentleman who prepared a most able paper in this case for the pursuer, the late Mr John Vans Agnew. The House of Lords conceived that those minors had not been called according to the forms of the law of Scotland, —that there was no evidence produced in process of a tutor ad litem being appointed for them. It was certainly, and it could only be on that last ground, that the judgment of the House of Lords proceeded. For I am quite aware of what your Lordships stated, that there was a citation, the only one required by the law of Scotland; and I see besides, in the decree of sale, it is expressly mentioned, that all the tutors and curators of the minors were cited edictally. That was independent of the other species of citation personally; and it is not possible for human imagination to contrive any other as requisite. What the House of Lords proceeded upon was, that there was no appearance in the process of the interlocutor nominating Lord Braxfield as tutor ad litem for the minor heirs of entail. There could be no doubt of the nomination of Lord Braxfield as tutor ad litem for the minors. The proceedings all go on—the informations—the

July 22. 1828. able papers—all go on, in the name of those persons, and of Lord Braxfield nominatim as their tutor ad litem.

Now, my Lord, as your Lordship has already mentioned, there is, in the first place, the judgment in 1784 with regard to the debts affecting that estate. That judgment was pronounced, I believe, during the period when there was a bench of as great Judges in the Court of Session as this country ever possessed. Lord Justice-Clerk Braxfield was one of those Judges, and on this point he was then entitled to judge; for Robert Vans Agnew being a defender in that action, as well as his children, there was no objection to his acting as their administrator at law, and therefore no necessity for a tutor ad litem. That was a pure point of law how far the estate was liable for the debts. That was the only point decided in the case of Drew, and it was decided by the most able Judges that were ever seen here. We are now considering the question of bona fides, and that is all the inference I draw. It was an unanimous judgment, and from that time till the appeal was entered, I do not know that the judgment was ever called in question.

We now come to the next part of the proceedings,—to the Act of Parliament. The moment the creditors were let in to affect the estate, the estate must have been actually destroyed at once, unless an Act of Parliament was obtained for selling part to pay off the debts. That Act of Parliament was obtained, the proceedings were placed under this Court for guidance, and the debts were calculated and examined by one of the most eminent accountants of his day, and who is still at the head of his profession. Every objection was discussed, and papers were given in in name of those minors and their tutors.

All this I merely observe to call your attention to this circumstance, that, from any calculation I can make, there could not have been fewer than a hundred persons to examine this process; for surely the agents of parties would look into the process before the lands were bought and the prices paid; and every person who examined this process must have been convinced, according to his opinion at the time, that the proceedings had been properly managed.

Sales were advertised,—sales by authority of this Court. And I always understood that, at one period of our law, and till very lately, sales under authority of this Court formed the best title to property any human being could receive. Those sales took place in presence of one of your Lordships. Competition took place upon every lot. The competition shewed bona fides.

Mr Hannay offered three times the amount of the upset price for his lot, and the upset prices were twenty-five years' purchase. I hardly remember, at that early period, to have heard of any instances equal to the high prices given at those sales. When I come to the question of bona fides, is it possible for any human being to believe that those persons, who offered such large prices above the upset prices, had not the most perfect bona fides? Those gentlemen, whose agents must have examined the titles, must have been satisfied all was right and regular in every respect. There was not only one agent, but many, and they all must have gone through the examination. Suppose they had no confidence in the respectable men who conducted the sale, there were other agents of abilities and integrity, some of whom are still living and preserving their high character; and is it possible to believe, that every one of those agents had not examined the whole of the proceedings of your Lordships, and found all clear? Therefore, if ever purchases took place to which bona fides attached, it was those purchases. I suppose a hundred men of business examined the proceedings, many must have examined them as the agents of intending offerers who did not purchase, and not an objection was stated at any one period to those proceedings. July 22. 1828.

Surely there must have been real bona fides, from the circumstances I have mentioned, from the real evidence of the high prices, and from the competition.

Your Lordships mentioned another circumstance, that of the persons who made those purchases laying out large sums in meliorations and improvements. In the report made by your authority, there are ameliorations stated to the amount of L.14,000; and is it possible that any persons, supposing they had a bad right, would have laid out that money? With all the ability which distinguishes the paper of the pursuers, I wish they had pointed out any circumstance from which the smallest suspicion on the part of those purchasers could arise. There is one circumstance mentioned—the only one I recollect—that of the warrandice. But is not that explained to your satisfaction? When a person, in a ranking and sale, signs the disposition, he must grant warrandice to the extent of what he receives; and how any argument can be founded on that circumstance I cannot comprehend. But this case going to another Court, that may not be acquainted with this circumstance, I think it my duty to enter on this explanation—and it is triumphant—that every person who receives a farthing of money at these sales is obliged

July 22, 1828. to give his warrandice for the amount of the sums he receives. Lord Galloway and Admiral Stewart were not only trustees but creditors; and the warrandice was not only proper, but absolutely necessary. When the matter goes elsewhere, I trust this circumstance will not be mentioned without the explanation that is necessary.

Let us go on. It has been said, that, at one sight, they must have seen this was an incompetent title, because there was wanting the appointment of Lord Braxfield as tutor ad litem—that it was not produced in the process. I believe it is not necessary for this Court, in delivering their opinions, to state what is the custom of this country—the situation of our records—and the effect such an objection would have had at any period on the minds of men of business. But, in speaking of bona fides, you must go to the country, and to the opinions in the country at the time the transactions took place. Suppose a new understanding and new law on the subject, you cannot apply that to bona fides in judging of the former transactions of men. You must apply the question of bona fides in relation to the time and to the persons acting under it.

I do not mean to question the judgment of the House of Lords, but to explain what I know with regard to the situation of the records of decrees at that period; from which it strikes me as extraordinary, that there is no other warrant of importance here at this time awanting but this one. I had what perhaps may be termed the misfortune of being apprentice with a writer to the signet, with my brother on my right hand (Lord Pitmilly); and he will I am certain concur with me as to the kind of places in which running processes were then kept—that they were low, dark, confined, miserable places. I never saw in my life such places as that and other offices of that time; and I was obliged to go to those places to borrow processes.

But that was not the worst. I ask, in whose hands were the whole processes, and warrants, and decreets, to be extracted? They remained in the hands of the extractors, who might have kept them in their own houses, or little closets, such places as were never seen in the world.

Most fortunately, there is a regulation that persons are not bound to produce their warrants after twenty years, otherwise I do not know what would have been the case, if a person who who had obtained decreet, and, in giving out execution, was called on to produce any of the warrants that had been left in this miserable state. Fortunately we have now a person appoint-

ed for such registrations—Mr Hay; and this is a most excellent change for the country, and most happy for the safety of the lieges. July 22. 1828.

I am only talking now of bona fides; and here were all the writers, agents—if the whole of them had searched those records, and seen those pleadings in the name of Lord Braxfield as tutor ad litem for the minor heirs of entail in existence, such an objection as that now founded upon by the pursuer could never have occurred. I say honestly and bona fide, the objection never would have occurred to me either as a lawyer or Judge. I do honestly and conscientiously believe, there was no lawyer at the Bar, no writer to the signet, nor a Judge in the country, who would have considered that as an objection, so as to affect the bona fides of the purchasers. I go no farther. That matter has been decided on by the Supreme Court of Judicature—I dare say well decided; but we have nothing to do with the merits of the decision, in considering the question now under consideration.

I do not know that one-half of the papers in that old process now exist. The half of many of them perhaps is worn away. Now, Lord Pitmilly and I, who were not long ago in the Outer-House, have had knowledge and practice of late as to the appointment of tutors ad litem. The thing is done in a moment. The gentleman is called to the Bar; and all that takes place is recorded in two lines on a paper. It may get out of the way, and the fact not be discovered; but the whole papers afterwards are given in in the name of the minors and their tutor ad litem. And is it possible to conceive, that the want of what is stated in two words as to this mere form of appointment, if observed, would have created a doubt in the mind of any agent employed for purchasers, or in the minds of Counsel that might have been consulted, and considered as sufficient to set aside those sales?

I concur in every word which your Lordships have stated; and I am only anxious to express my views as to what may not have been already stated by your Lordships; and if the question comes to be one of bona fides, and to rest on the non-production of a document, at the distance, I believe, of thirty-six years, to state my conviction, that it is impossible that any objection to bona fides can be founded upon this.

And, as this matter is open to us, I come to the question in point of law. I say, first, I can see nothing that can affect their title of bona fide purchasers; and I come now to the law as applicable to that.

July 22. 1828. Lord Stair and all our lawyers state, that bona fide consumption, in such cases, is a sufficient plea against a claim of restoration of bygone fruits. One case, which he cites in illustration, is, where 'forgery' applied to the title of possession; yet as the possessor was found to have been a bona fide possessor, he was not bound to restore what he had bona fide reaped and consumed. The case is collected and reported by his Lordship. In that and other cases, he gives a clear and philosophical explanation of the application of the Roman maxim to our law; and he states, that where there is a probable title, the possessor will be entitled to plead bona fides; the rule of the Roman law being, 'Bona fide 'possessor rei alienæ facit fructus perceptos et consumptos suos,' and the definition of a bona fide possessor being, 'Bona fidei 'emptor esse videtur, qui ignoravit eam rem alienam esse; aut 'putavit eum, qui vendidit, jus vendendi habere.'

According to the law of Scotland, can any man doubt whether the title of those purchasers was a probable title? Nay, could any man have suspected any error in the title?

Such being the case, all lawyers, from Balfour downwards, are agreed. And not one of them says otherwise than that a probabilis causa must have the effect of supporting the plea of bona fides.

There remains only this other point,—from what period was the bona fides of the defenders put an end to? It could not be put an end to by the unanimous judgment of this Court in their favour. Then, when was it put an end to? The first thing assuredly that could have shaken it, was the decision of the House of Lords in July 1822.

There was a great deal in Lord Glenlee's opinion, which it must be quite impossible for any one to depart from; and I confess, that on reading the papers in this case I supposed, with his Lordship, that the bona fides here must be held to have continued till the second opinion of the House of Lords was pronounced; and which, of course, necessarily carried down the bona fides of the defenders to the term of Whitsunday 1823, the term immediately succeeding the deliverance of that opinion; because the petition for delay to this Court, and the consequent reconsideration in the House of Lords, did keep the matter open, and obtained an alteration in the judgment which that Supreme Court pronounced, and on the very point you are now considering.

I agree with Lord Glenlee, as to what his Lordship stated in that view of the case; but it seemed to me impossible to main-

tain or give effect to that, after looking to Mr Bell's paper for the defenders, in which this claim is only insisted on from Martinmas 1822, the term immediately succeeding the first judgment of the House of Lords. I had formed an opinion similar to that of Lord Glenlee, till I was stopped by the parties limiting their claim in this way; and I think the Court should not go beyond what is desired by the parties themselves. July 22. 1828.

With regard to the period of Martinmas 1822, there cannot be a doubt that is the period down to which your Lordships must hold those parties had bona fides in their possession. Though the date of the first judgment of the House of Lords is the 31st July 1822, yet you know the bona fides must always be carried till the next term. When a man enters to a landed estate, he cannot draw a sixpence till the next term; and during that interval, though the rents are not percepti, yet is he not subsisting on the footing of those rents? He got his wine, meat, &c. relatively to them, and, therefore, they are actually consumed, although de facto they are not reaped.

This is a principle adopted by you in other cases, and adopted by the House of Lords in the two cases referred to by the parties, and that have been mentioned on the Bench. I allude to the case of Lord Wemyss and the case of the Duke of Buccleuch. Lord Wemyss had executed a summons before the Duke of Queensberry's death. The whole parties were put on their guard from the moment of the Duke's death. Yet, even in that case, where one Division of the Court of Session had decided in favour of the reducer's rights, and the House of Lords merely affirmed that judgment; the House of Lords was clear, and judged that there were no violent profits due—that the possessors were bona fide possessors till the term after the judgment of the House of Lords. Can you compare that with the present case, where the parties had not the least reason to expect their situation to be altered, or any thing on record that could touch their right, till that judgment of the House of Lords?

Therefore you must go to the term of Martinmas following the first judgment of the House of Lords, according to the limitation made by the defenders in this case.

I must say, of all the cases I ever saw, in which bona fides was disputed, I never saw one in which it was more completely and satisfactorily established, than in the present case by those purchasers, the defenders; and in which there was less brought forward to impugn that plea.

July 22. 1828. *Lord Justice-Clerk.*—It is not necessary to say much on the other question in the sequestration.

Lord Glenlee.—There is a proposition by Mr Bell, in his answers to the petition on that subject. He says, 'The respondents therefore agree, that the petitioner shall receive the 'rents recovered by the judicial factor falling due from and 'after Martinmas 1822, provided the respondents are found entitled to receive the rents recovered by the factor falling due 'at and preceding Martinmas 1822.'

Moncreiff.—I apprehend that what your Lordships have said on the former question which you have just now decided, settles this too.

A. Bell, for the respondents.—Your Lordships will give us expenses.

Moncreiff.—It seems quite unnecessary to say any thing, as you are acquainted with the case. But you will observe, that the question of expenses involves a great deal. There is a question of expenses before the appeal; and you must remember the judgment you pronounced in the case of Maberly and Company against the Bank of Scotland, in which I was one of the Counsel for the pursuer.

Lord Alloway.—Was there any appeal on the question of bygone rents?

Lord Justice-Clerk.—Mr Agnew appealed against the judgment of your Lordships in favour of the defenders; and it is since the House of Lords pronounced judgment of reversal, and afterwards amended that judgment of reversal, that the questions before us to-day came to be discussed here.

Moncreiff.—I am speaking at present as to the question of expenses prior to the appeal. In the case of Maberly, you had found for the defenders, and gave them expenses—the pursuer appealed, and the House of Lords reversed your decision, but said nothing about expenses. When the case came back here, you awarded to the pursuer the expenses prior to the appeal. You will find this reported 11th March 1826, Shaw and Dunlop's Reports, where the title is, 'Competent to award 'to a pursuer expenses prior to an appeal to the House of Lords, 'who had reversed a judgment of absolvitor which found expenses due to the defenders.' The report says, 'The judgment of your Lordships, (which, besides assoilzieing the Bank 'of Scotland, found them entitled to expenses of process), 'having been taken to appeal, was reversed by the House of 'Lords, and the cause remitted, to allow a proof, but without

'any finding as to expenses.' The subsequent proceedings are then noticed; and 'no evidence having been led by the Bank, 'the Court decerned against them in terms of the libel.' Then it is stated, 'A motion was then made on the part of Maber-'ly and Company for the expenses of process in this Court, 'both prior and subsequent to the appeal. The Bank objected, 'that so far as regarded the expenses prior to the appeal, it 'was incompetent to award them; but the Court unanimously 'found Maberly and Company entitled to expenses, both prior 'and subsequent thereto.' July 22. 1828.

The *Lord Justice-Clerk* is reported as saying, 'I am of opi-'nion, that there is no incompetency in awarding those prior to 'the appeal.'

It is then added, 'The other Judges concurred, and Lord 'Alloway mentioned that the same thing had been done in the 'case of Falljambe against Fullerton.'

So that, here, the first question relates to the expenses prior to the appeal. Your original interlocutor awarded expenses to the defenders; but the pursuer of the action having been found right by the judgment of the House of Lords, has a competent claim to the expenses, though nothing is said on the subject in the judgment of the House of Lords,—just as in the case of Maberly with the Bank of Scotland, when the House of Lords reversed the judgment of this Court which had given expenses to the defenders, and when you afterwards awarded them to the pursuer, although the House of Lords had said nothing on the subject.

With that observation I leave that part of the case.

As to the claim for expenses in the question as to bygone rents, consider the situation of the pursuer here. You see, in the first place, if the pursuer was not to get the expenses of the prior proceedings, he would be in a hard situation. He was a liferenter, and did not live to draw enough to defray the expenses of the action for obtaining that which he has been found to have had the right to possess;—he did not live to draw enough to defray the expenses of the action in which he was found in the right. It is a very harsh demand, therefore, by the defenders, to say they will have expenses as to the claim for bygone rents, while they withhold the rents to which it has been found the pursuer had right.

Dean of Faculty, (Cranstoun), for the respondents.—We are not demanding expenses previous to the appeal, but as to the bygone rents since the case came back from the House of Lords. Can it be held there was a probabilis causa to the pursuer to

July 22. 1828. insist in his claim for bygone rents, after your opinions just delivered; and considering the whole tenor of the law of Scotland on the subject, and the late judgments of the House of Lords in the Queensberry cases, shewing the established law of Scotland?

As to the expenses, therefore, of the discussion regarding bygone rents, there cannot be a doubt we are entitled to them. Whether the parties can ask expenses before the date of the appeal is a different question.

Moncrieff.—It is we who are asking the expenses prior to the appeal. They make the one motion, and we make the other.

There is a little more in the case. There is the expenses in the question as to the removing, in which we were also successful; and, in that case, the question of expenses was expressly reserved, and may now be decided.

And, in the process of sequestration, we were substantially successful.

A. Bell.—Your Lordships, in the original action, found us entitled to expenses. They were paid to us. The House of Lords reversed the decision of this Court, but said nothing of expenses. The expenses were paid back by us to the pursuer. So the matter stands. And now they demand their previous expenses.

The question of removing was connected with that as to meliorations. If expenses had been asked when the removing was ordered, the Court would have determined on the subject.

The question as to the bygone rents having now been decided in our favour by your unanimous judgment, the expenses in it ought to be awarded to us as matter of course.

Moncreiff.—The question as to expenses prior to the appeal is exactly in the same situation in which it stood in the case I have mentioned.

Lord Justice-Clerk.—In that case of Maberly, we thought there was sufficient ground to find for the defenders, without any investigation as to the practice. From the shewing of the summons, we held there was ground for assoilzieing the Bank, and we gave expenses to the Bank. The House of Lords reversed our decision, and made a special order for proof. On parties being allowed that proof, the Bank led none; and the Court, seeing the pursuer had proved his case, gave him expenses. We had turned him out of Court upon what we considered a preliminary objection to the action; and having given the Bank expenses when we so decided in its favour, we thought it right,

when the case came back and was decided differently, to give the pursuer expenses. July 22. 1828.

Lord Alloway.—This question is limited to the bygone rents.

Lord Justice-Clerk.—But the pursuer says, if you give that to the defenders, give me the previous expenses.

Moncreiff.—In this action they had no termini habiles for liquidating their meliorations. They insisted on a right to retain possession for the meliorations. In that they were found in the wrong, and there was much expense in it.

A. Bell.—That was a small part of the case.

Lord Glenlee.—We may delay the questions of expenses till the termination of the whole case.

Moncreiff.—On page seventh of the additional petition before you, you will find your interlocutor on the question of removing. 'On report of Lord Pitmilly, and having considered the mutual 'informations ordered by the Lord Ordinary, and heard Coun-'sel for the parties, the Lords decern in the removing against 'the defenders from the several lands libelled at the term of 'Martinmas next, and allow the decree to be extracted as an 'interim decree in the cause, after the expiry of the reclaiming 'days, reserving to the defenders all claims for meliorations and 'bygone rents, and to the pursuer his objections thereto, and to 'both parties their mutual claims for expenses; ordain the defen-'ders to deliver up to the pursuer, quam primum, the title-deeds 'of their respective purchases anterior to the periods of the sales; 'and before answer as to the claims for meliorations, remit to 'Dr Coventry; whom failing, to Mr George Brown, land-'valuator, to visit the different estates in question, examine the 'same at the sight of all parties, and report on the nature and 'extent of the alleged meliorations to this Court, on or before 'the first sederunt day in November next.' And on the same day, 7th June 1824, you 'recall the sequestration of the lands sold 'to the defenders, and that at the term of Martinmas next, and 'decern.' And by another interlocutor of the same date, you recalled the judicial factory as at that term of Martinmas.

Dean of Faculty, Cranstoun.—The question of meliorations was not decided.

Moncreiff.—But it was decided that the defenders were not entitled to retain possession of the lands.

Lord Glenlee.—In the question of meliorations, we may still decide as to expenses.

Moncreiff.—There is no such question here. There was a separate action raised as to meliorations.

July 22. 1828.

Lord Justice-Clerk.—The question as to meliorations is no branch of this litigation.

Lord Glenlee.—You are now obliged to decide as to the expenses.

Lord Justice-Clerk.—This question is really a sequel of the judgment of the House of Lords,—'And further, to proceed as 'shall be consistent with this judgment, and shall be just.' The demands of both sides are quite competent to be determined by the Court.

Moncreiff.—If you do not dispose of the question of expenses now, there is no possibility of bringing it again before you.

Lord Justice-Clerk.—There is no other stage. And so far as regards the remit made to Dr Coventry, that had reference to the question of meliorations. The only thing decided by our interlocutor referred to, as to which we are now called to decide as to expenses, is in relation to the removing. Therefore, as to all expenses in relation to the remit to Dr Coventry, they come under the question of meliorations. But we are otherwise bound to decide, the demand having been made. The Dean of Faculty maintains, as to this latter branch of litigation regarding the bygone rents, that Mr Agnew having failed in it, we should award the expenses of it to the defenders. But, on the other hand, Mr Moncreiff says,—It having been found by the House of Lords, that in the general question Mr Agnew was in the right, he is entitled to his expenses, in as much as he has been successful in the litigation between the parties. It is competent for us to decide on both the motions which have been made.

Lord Glenlee.—The prayer of the petition before us is, 'to 'find that the petitioner is entitled to receive the rents collected 'by the judicial factor, and now in manibus curiæ, and to decern 'accordingly; also to find her entitled to the whole expenses of 'the sequestration, or otherwise to do in the premises as to your 'Lordships shall seem just.'

Lord Justice-Clerk.—Pronounce judgment, and before answer as to expenses ordain mutual accounts to be put in. It is not necessary, at one and the same moment, to decide the case and to find as to expenses.

The following interlocutor was then pronounced:—'19th May '1826.—On report of Lord Mackenzie, and having advised the 'mutual informations for the parties on the claim by the pursuer 'for bygone rents, find, that the defenders were bona fide pos-'sessors of the several subjects purchased by them, down to the 'period of the judgment of the House of Lords on 31st July 1822,

'and therefore repel the claim of the pursuer, so far as concerns July 22. 1828.
'the rents thereof for crop and year 1822, and preceding years,
'and decern; and before answer as to the mutual claims of expen-
'ses, appoint both parties to put in their accounts of expenses.'*

Thereafter, the accounts of expenses for the parties having been lodged,

Lord Glenlee observed,—Our competency to give a party expenses prior to an appeal, on which the House of Lords reversed the decision of this Court, which also decerned as to expenses, but where, on the subject of expenses, the judgment of reversal is silent,—may be liable to doubt at present on general principle. But as to the case of Maberly, it was of a different nature from the case of Mr Agnew, which is now before us. In this case, the whole matter was before the House of Lords, with our finding as to expenses; and the real and true ground to go upon is, that unless such a full and articulate judgment of reversal gave express instructions as to expenses, we are not perhaps called upon or entitled to decide as to those previous expenses. But that did not apply to the case of Maberly. There the House of Lords held, that we should be far better judges of the propriety of the action, after a proof should have been taken, and, when uncertain of the result of that proof, they would say nothing as to expenses: and when the case came back to us, in consequence of the Bank declining to take any part as to the proof, there were strong grounds, from what turned out in the case, to find the Bank liable in expenses. But here we are called on to decide as to expenses, in a question which was fully before the House of Lords. Was not the whole case before the House of Lords, with our interlocutor in favour of the defenders, and awarding them expenses? Therefore, as the judgment of the House of Lords, which reversed our judgment on the merits, says nothing of expenses, I am quite clear we ought not to give expenses to the pursuer in this case.

As to another question regarding expenses, it is a very different thing where meliorations are ascertained, and possession is retained or claimed till security be found for them, from the case where lands are claimed to be retained till meliorations shall be ascertained.

I think the best way here is to give no expenses to either party.

(His Lordship then spoke of the bona fides of the defenders in this case, and of the effects of it in law in the questions betwixt

* See 4. Shaw and Dunlop, No. 379.

July 22. 1828. the parties; but the reporter could not hear distinctly what his Lordship said on the subject.)

Lord Pitmilly.—I agree in the opinion which has been delivered. As to the expenses before the reduction by the House of Lords, I am clear, as Lord Glenlee has put it, that there is nothing, in point of rule or principle, as to expenses in general, to govern imperatively the present case. I think his Lordship's clear distinction between this and the case of Maberly, founded upon by the pursuer, is well founded; and there can be no question about it.

As to expenses since the remit:—There have been two questions discussed by the parties since the remit, in one of which the pursuer has succeeded, and in the other the defenders have succeeded. The defenders have lost their plea as to retention of the lands for meliorations, in which a good deal of discussion took place, and expenses were incurred; and, on the other hand, the pursuer has lost his plea as to bygone rents. It appears to me that no expenses should be allowed in either case, but the one should stand against the other.

Lord Alloway.—My conclusion is very much the same with that of your Lordships who have spoken on the points as to expenses.

As to that regarding the first case, viz. the proceedings prior to the appeal, it is impossible that the pursuer should get expenses. Here there was an unanimous judgment against him by your Lordships, and finding him liable in expenses to the defenders; which judgment of this Court was no doubt reversed by the House of Lords; but that judgment of reversal by the House of Lords said nothing on expenses. Your judgment was reversed by the House of Lords; but if the House of Lords had considered that the pursuer was entitled to expenses, their judgment would have stated the point of expenses, and found them due to him, or mentioned them in the remit.

Mr Bell's argument, founded on the case of Pringle v. Tod's Legatees, 6th March 1799, and other cases, is, that it is incompetent for this Court to find now as to those previous expenses. I have doubts upon that subject; and if it was necessary to give an opinion I would say, that I rather think that the point of competency is still open.

Although the judgment of this Court was reversed, the defenders were entitled to hold that judgment to be the law till they were taught the contrary by the judgment of the Court of appeal; and the question of bona fides here makes the case diffe-

rent from that of Maberly, and that of Falljambe, mentioned in the report of the case of Maberly. Had this been a question of duty, and the House of Lords had fixed a different principle from what you did, and had altered your judgment upon that point, the case of Maberly would have applied. There the circumstances justified the claim. The whole case went to the House of Lords; it was remitted to this Court to allow a proof; a proof was allowed; and it was upon the result of that proof the case of Maberly was then decided. July 22. 1828.

We had a case, which is alluded to in the report of the case of Maberly, Falljambe, not reported, in which this Court had first found that there was no claim for damages. That case went to the House of Lords, and it then came back here. The Court found there was no claim against William Elphinston. The House of Lords reversed that judgment; and when the case came here, it became necessary to find whether damages would include the previous expenses. None were found due. The case then went to the House of Lords. Expenses could not be found there. The case came back from the House of Lords, and then you found the whole expenses, from the beginning of the action, due as part of the damages. And I think the interlocutor was right. But it is impossible to apply that case to this.

With regard to the right of retention on account of the meliorations, I confess that, if I had been sitting here when that point was before your Lordships, I should have hesitated as to finding it did not belong to the defenders. My reasons of doubt are founded upon the right in law, which, whenever it allows this plea of meliorations to persons holding property and thinking it their own, gives them retention till they are repaid. This was also the clear rule of the Roman law. If I had been sitting here when that question was before you, I would have expressed those doubts; but that is decided.

But is there any ground for giving expenses to the pursuer? I cannot find that the purchasers were wrong in defending what they believed to be their own; and I rather hold that they should have held the estate till indemnified in these very expenses. And therefore, if the question had depended on that point, I should have been quite clear that no expenses were due to the pursuer.

But coming to the last point, that as to bygone rents and fruits, is it possible there can be any doubt as to it? No bygones were due till the decision of the House of Lords. Mr Pyper

July 22. 1828. has stated strongly, that we should take into consideration the advantages derived by the defenders from the other party, the pursuer, being kept long out of possession. I am rather surprised at what has been stated. It occurs to me that this gentleman has been the most successful litigant that was ever before a Court of law. I do not remember ever to have heard of such success in such a plea. I do not find fault with the judgment of the House of Lords; but I never can change my opinion, that Mr Agnew has been a wonderfully successful litigant; and, therefore, the other parties have been just as unsuccessful and unfortunate.

If it had been necessary to decide the question of bygone rents as a single point in this case, and not upon taking a complex view of the whole case, my opinion would have been decidedly that this party was liable in the whole expenses to the purchasers. But I do not wish to take a different view from your Lordships in this matter, and I adopt the opinion which has been given as to expenses, finding none due to either party.

Lord Justice-Clerk.—Upon all the three points as to this claim for expenses, my opinion is the same with your Lordships, that we ought not to allow them.

As to the first point, I am surprised the claim is made. No doubt it was reserved. But, considering the peculiar circumstances in which the cause originated here, the manner in which the litigation was conducted, and the different judgments pronounced here, and only altered by the House of Lords in 1822, unless that House, which could have done so, had directed us not only to restore the lands to the pursuer, but to award full expenses, I did not think the party would have made that demand. For, unless it were imperative in every case, whatever might be the ground of doubt as to an action, that expenses were always given to the prevailing party, it was extravagant to entertain any hopes that we would here award them.

And here there is this peculiar feature in the case. The judgment of this Court awarded expenses against Mr Agnew, the pursuer. Execution pending appeal was granted, and they were paid by him; and that must have been pressed upon the House of Lords. And yet that House did not instruct us to give expenses to Mr Agnew. Therefore, admitting there may be cases in which, after a judgment of the House of Lords, it may be competent for this Court to award expenses incurred previous to appeal, sure I am that this is a case where, the House of Lords having given no hint that such should be the sequel of their

reversal of our judgment, you would not interpret that this was their meaning. July 22. 1828.

As to the other matters, I am also of the same opinion as your Lordships.

As to the plea of retention of the lands in security of meliorations, I may remark, that it was not considered by us so free from doubt as that we should be surprised that Lord Alloway does not agree with what the Court found. But the question was well heard and considered here. We felt, as we ever have done, that whatever our opinions might be, we were bound to follow out the judgment of the House of Lords, and therefore we decerned in the removing. It was only retention for security; and, under all the circumstances, we decerned in the removing. But is that a case for expenses?

As to the other case, regarding the bygone rents, considering the very hard fate of those gentlemen, whatever Mr Vans Agnew, or others for him, may have stated, I venture to say, that there is no part of the human race who differ on the subject; all must agree in opinion that the hardship is upon the defenders. And after they had been in possession during thirty or forty years, a demand being made of bygone rents, we are well entitled to award expenses to the parties.

We must measure out justice to both parties; and I concur with you in thinking, that setting off the one case against the other, as has been proposed, is right, and to refuse expenses to both parties.

The Court accordingly, on the 24th June 1826, 'found no 'expenses due to any of the parties.'*

Both parties appealed; Mrs Robertson on the merits and expenses, and Lord Stair and others as to expenses.

Appellant, (Mrs Robertson).—I. The House of Lords having declared, that the children of Robert Vans Agnew appear, on the face of the proceedings, to have been minors when the interlocutors in the action of declarator and sale raised against them were pronounced, and not to have been properly brought before the Court as defenders in that action, it is now quite incompetent for the respondents to say that, de facto, the children were properly called. The question must be argued as one in which it has been finally decided, that the sale has been made a non do-

* 4. Shaw and Dunlop, No. 456.

July 22. 1828. mino; leaving the single inquiry, to whom belongs the rents and profits which have fallen since the accession of the person illegally kept out of possession? The general rule clearly is, that a party who is bound to restore an estate, of which he has illegally had possession, to its true owner, must also restore the fruits and profits of which the true owner has been deprived. To this there is the exception, Bona fide possessor facit fructos perceptos et consumptos suos. But this rule, from the nature of the property in question, is inapplicable. The present is an instance of an heir of entail, a mere liferenter; and if bona fides did protect, it would only do so to the extent of the interest of the fruits. The most unjust consequences would ensue if the fruits themselves could be swallowed up; an heir of entail might litigate for his lifetime, and dying on the day his right was declared, take nothing by his victory. The maxim, therefore, of bona fide possessor, &c. cannot to any extent be pleaded against the right conferred by the statute 1685 on heirs of entail. Besides, the sale was authorized by a private Act, to the provisions and directions of which the seller was bound to adhere. The purchasers did not make themselves acquainted with the provisions of the statute; they were guilty of an indiscretion and rashness for which they alone must suffer; and if they were aware, then they stand in this question in pessima fide, and in both cases must make restitution of the fruits to the true owner. The exception has been introduced in favour to the innocent possessor, who has reaped and consumed the profits; and in pœnam of the neglect of the true owner, who allowed the innocent consumer to be deceived. But here there was no neglect on the part of the true owner. The only inquiry therefore is, What is meant by the innocency of the consumer? Now, where the circumstances of the case are such, that the party taking the null or defective right ought to have been aware of the fraud, the plea of bona fides is no protection. Culpa lata equiparatur dolo. But here the gross departures from the provisions of the statute were too apparent to permit the purchasers to say that they were ignorant of them. The smallest attention and reflection would have shewn that the title was void. In truth, they were in mala fide throughout. But the plea of bona fide possessor, &c. is barred by the late pursuer's privilege as a minor to restitutio in integrum. This is undoubted law, and founded on the soundest policy. The lesion done to the substitute heirs is manifest, and the expiry of the quadrennium utile does not bar the privilege, since the quadrennium has only reference to deeds requiring reduc-

tion, not to deeds which, being null in themselves, admit of a mere declarator of nullity. Besides, the respondents, by the very terms of their purchase, have protected themselves by clauses of warrandice, and recourse is therefore still open against the pursuer of the sale, and the creditors paid under it. July 22. 1828.

II. At all events, the appellant is entitled to repetition from the date of the service of Mr Agnew's appeal in July 1810. That was equivalent to citation, and was a judicial warning that the sales were to be challenged, and operated as an absolute extinction of bona fides; for this challenge did not rest on grounds of an obscure and doubtful nature, (which might warrant the continuance of bona fides until the first and final judgment on it), but on plain and manifest nullities. At any rate, it is quite impossible to conceive that the bona fides can last longer than the judgment of the House of Lords on the 31st July 1822; and therefore, the profits from that day, and not merely from the Martinmas following, belonged to the appellant.

III. The appellant is entitled to the expenses incurred in this litigation, and particularly to those prior to the appeal in which he was successful.

Respondents.—A question of bona fides is one of fact, depending on the circumstances of the case. The doctrine it involves is founded on equity, and enforced by positive law. There is nothing in the res gestæ of this case that is inconsistent with the most perfect bona fides of the purchasers. Neither collusion nor any moral blame attaches to them; and if there did, that could not affect the respondents, who were neither cognizant nor participant therein. But the judgment of the House of Lords does not proceed on the presumption of delinquency, but on a technical flaw in the proceedings;—a nullity neither so obvious nor indisputable as to operate as a bar to the defence of bona fides. A mere mistake in law, if a real and sincere mistake, will not shut out bona fides, or the benefits flowing from it. In order to exclude the plea, there must be an error of that glaring kind, that no person of ordinary understanding can be supposed to have overlooked it, or to be ignorant of its fatal nature. But there is nothing of this kind tainting the proceedings in the present case. Indeed there is still very great doubt whether the fact truly was as assumed in the House of Lords, that no tutor ad litem had been appointed to conduct the minors' defence; and, at all events, the parties purchasing could not be held to be very blamable if they allowed themselves to be misled on a point so dubious. Besides, the error, if one, is imputable to the Court;

July 22. 1828. but purchasers at sales under Acts of Parliament, carried on before the Court of Session, are not liable for mistakes of the Court. The private statute gave no particular instructions as to conducting the process of sale, but left those to the usual form of the Court; and there was nothing to warn the respondents that these forms had not been rigidly observed. Though it may not in questions of title, yet in questions of bona fides ignorance excuses. The plea of restitutio in integrum is inapplicable. This is not an action of reduction on the head of minority and lesion, either in form or substance, and besides, was not brought within the quadrennium utile. The warrandice is of little or no value, but even if it were the reverse, the plea is jus tertii to the appellant. There is nothing in the argument founded on the statute 1685; for whenever part of an entailed estate is set free from the fetters of an entail by an Act of Parliament, the entail becomes quoad hoc non existant.

The period at which the bona fides must be held to cease is in the arbitrement of the Judge. In the present instance there is nothing that should have created the conscientia rei alienæ, until the judgment of the House of Lords reducing the sales. Bona fides is not lost by mere citation, unless the nullity be so clear as not to bear two opinions, which certainly is not the case here. It is plain that a term cannot be divided into fractional parts, and therefore the Court most correctly found the rents due up to Martinmas, the first term after the judgment of the House of Lords, to belong to the respondents.

Every consideration of justice tends to shew that the appellant was not entitled to expenses, and that the respondents were.

The House of Lords found, 'that their Lordships having, on 'the 31st of July 1822, declared the title of the then appellant, 'John Vans Agnew, to have the lands in question restored to 'him, the possession of the respondents in the present appeal 'could not be deemed a bona fide possession after that day, and 'the said John Vans Agnew ought to be considered as entitled 'to demand from the tenants of the lands the rents due from 'them, as if he had then first succeeded to the title under the 'entail under which he claimed, unaffected by any act to his 'prejudice; and their Lordships are of opinion, that the repre-'sentative of the said John Vans Agnew is entitled to receive 'the rents which fell due at Martinmas 1822, being after the 'judgment of this House. It is therefore ordered and adjudged, 'that the interlocutors complained of in the said original appeal,

'so far as they repel the claim of the appellant as the represen- July 22. 1828.
'tative of the said John Vans Agnew to the rents due from the
'occupiers of the lands in question under the respondents, which
'became due at Martinmas 1822, subsequent to the judgment of
'this House of the 31st of July 1822, be, and the same are here-
'by reversed; and it is also declared, that the appellant is en-
'titled to the rents which became due at Martinmas 1822, from
'the several tenants of the lands in question, without prejudice
'to any question whether, if the respondents, or any of them,
'were in the personal occupation of any part of the lands in
'question, and had sown crops thereon, they were entitled to the
'benefit of such crops gathered before Martinmas 1822, although
'subsequent to the 31st of July preceding. And it is further
'ordered, that the cause be remitted back to the Court of Session
'to give directions accordingly. And it is further ordered, that
'the said cross appeal be, and the same is hereby dismissed this
'House, and that the interlocutor of the Lords of Session of the
'said Second Division, so far as complained of in the said cross
'appeal, be, and the same is hereby affirmed. And it is further
'ordered, that the appellants in the said cross appeal do pay or
'cause to be paid to the respondent, the sum of L.60 for her
'costs, in respect of the said cross appeal.'

LORD REDESDALE.—My Lords, There is the case of Robertson *v.* the Earl of Stair, which has been argued before your Lordships, and the question upon which is now confined to one point. Your Lordships will recollect that there was a decision of the Court of Session, giving the profits of the estate to the representatives of Mr John Vans Agnew, but only from the time when the Court of Session adopted the decision of this House. My Lords, the decision of the Court of Session I conceive to have been well founded in other respects, though certainly a very harsh decision, because the consequence of it was to give a certain degree of effect to a most fraudulent transaction which had taken place, by which the original party in this cause, Mr John Vans Agnew, was deprived for many years of the possession of a considerable property to which he was entitled; but the Court of Session having at first decided against his title, when this House afterwards reversed that decision, they decided in favour of his title.

My Lords,—According to what has been of late years decided to be the law of Scotland, though it was not certainly the original law of Scotland, what are called bygone profits are not to be given against persons who hold by a bona fide title. The decisions of the Court of Session have of late years been very strong upon that subject, though I think they were contrary to the old law upon the subject,—contrary, I should say, to the law as it is manifested by the old Act of the Scot-

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tish Parliament, which thought it necessary to make a particular law in the case of a succession to entailed estates, upon the decease of the heir in possession, that bygone profits should not be given against the tenants who were bona fide in possession, and holding by leases, and paying the rents that were due, which shews that the old law of Scotland upon that subject was far different from that which has been recently established; but I should hold, that we are so bound by what has been recently established, that we cannot do that in this case, which, if the question had arisen in the Courts of this country, would have been thought justice.

My Lords,—I conceive that the Court of Session have clearly been wrong upon their own principles, but to a small extent. I conceive that the moment that this House pronounced against the right of the persons who were in possession, they could no longer be deemed bona fide possessors, because they protected themselves before under the decision of the Court of Session in their favour, and they could not protect themselves any longer by that decision, when the judgment of this House reversing that decision was against them. I apprehend, therefore, that according to the principle even of the recent decisions of the Court of Session in Scotland, this interlocutor ought to be reversed, so far as it refuses the profits of the estate until the order of this House was made the order of the Court of Session; because it is perfectly clear, that under that old Act of Parliament I have mentioned, the old law of Scotland was unquestionably different from that which is now the rule of the Court of Session.

My Lords,—I should therefore say, that although, when the Court of Session had decided that the proceedings had been proper under the Act of Parliament, under the authority of which the estates in question were disposed of, the persons who take under the sales that took place might be the bona fide holders of the property, yet, from the moment that this House had reversed those decisions, they could no longer, upon any principle whatever, be the bona fide holders.

My Lords,—For a number of years the profits of this estate will be lost to the representatives of Mr John Vans Agnew, according to the rule applicable to this subject laid down by the Court of Session, which it is desirable to adhere to, so as not to throw the law of that Court into confusion; and though I think that they have decided against what was the law in my humble opinion, and against what has been laid down as the law, yet that has been done in so many cases, and was recognized by this House in the case of the lessees of the Queensberry estate, that it would be impossible now to alter that part of the decision; but so far as it refuses the bygone profits from the time when this House pronounced a decision against the title of the respondents, I think it is impossible to say, that the representative of Mr John Vans Agnew is not entitled to those rents and profits; and therefore I should propose so far to reverse the decision, and to declare that the repre-

sentative is entitled from the time of the order of the House upon the subject. July 22. 1828.

My Lords,—It would be very extraordinary indeed, if the order of this House was not to have any effect till it was made an order of the Court of Session. Those of your Lordships who were present in this House upon the former occasion, will remember the pains which the Court of Session took to delay obedience to that order; and perhaps, under those circumstances, this House ought to have taken stronger notice of that than they did.

My Lords,—There is a cross appeal, which is with respect to costs; and it is most extraordinary that those persons should conceive that they ought to have had costs. That under these circumstances they should conceive themselves entitled to costs, against a person who is in conscience unquestionably entitled, and whom nothing but a rule of law excludes from a portion of what ought to be the result of that title, is certainly very extraordinary. Therefore I should submit to your Lordships, that that ought to be dismissed with costs. With respect to the other subject, upon which the Court of Session have given the decision I have mentioned, the only alteration that can be made upon that subject will be, to give the profits of the estate from the time that the House pronounced the decision in favour of Mr John Vans Agnew. It is not a large sum in itself, but it is considerable with respect to the property in litigation.

My Lords,—I believe it will be necessary to frame an order upon the subject, which I have not done, not knowing whether the noble and learned Lord near me would be able to attend to-day or not; but if your opinion concurs with mine, it will be necessary to frame an order to that effect.

EARL OF ELDON.—My opinion is exactly the same with that which has been stated by the noble and learned Lord; and I state that opinion with great regret, because it does appear to me that the law of Scotland, as it has been established, works a most gross injustice; and it is very desirable to consider whether by statute it should not be altered. This is the case of an heir of entail, who is, as your Lordships know, for many purposes, not more than a tenant for life; and if those who go before him in the enjoyment of the estate abstract the whole value from his life estate, he can have no remedy, although he can recover the estate for himself and those who come after him. But such is the law of Scotland, so often pronounced, and in the Queensberry case confirmed by this House, that I apprehend it is impossible to remedy it except by statute. I say again, that I regret that I am obliged to concur with the opinion of the noble and learned Lord.

LORD REDESDALE.—I cannot forbear from making an observation with respect to the Queensberry case. The Duke of Buccleuch

July 22. 1828. quarrelled the disposition which had been made of the estate. The final judgment in this case was not obtained till shortly after his death. He was in litigation a number of years,—at last, after incurring immense expense, his representative obtained a judgment in his favour, and by that judgment he got nothing.—That is the law of Scotland!

On a subsequent day Lord REDESDALE rose and said,—My Lords, There is a case of Robertson v. the Earl of Stair, which was heard before your Lordships some time ago, on which I will trouble your Lordships with only a few words. The case simply was in respect of the bygone rents and profits of a property which had been recovered, as to which there was a former judgment by this House, avoiding certain transactions which had taken place. The question was, whether the succeeding tenant in tail was not entitled to those bygone rents and profits; but as the Court of Session had not seen fit by their judgment to avoid the acts of the former tenant in tail, they were of opinion that they could not give those bygone profits to the person who was the succeeding tenant in tail. It was insisted, when the case was remitted to the Court of Session, that the parties who were in possession were, under the title they had acquired, to be considered as bona fide holders of the estate, and consequently not answerable for the bygone profits.

My Lords,—When the cause came on to be heard on the appeal, as to that part of the decree which decided that these individuals ought to be considered as in bona fide possession, (the Court of Session having been of opinion in their favour as to the validity of the sales, but which was reversed by this House), it followed, that from the moment that was reversed on the 31st of July 1822, it could no longer be said that they were to be considered as bona fide possessors; and therefore I conceive, beyond all question, from that moment the party who had the judgment in his favour was entitled to the estate; and that would, according to the law of Scotland, and according to authorities which might be referred to on the subject, entitle him to demand of the tenants in possession under the preceding tenant in tail, the rents which became due at the next rent day, not at the moment disturbing those tenants. Under that impression I originally proposed the course I did. I understand that some of the parties were in the actual possession and enjoyment of land,—not that that appears, as I can find, in the proceedings, but it is so suggested. Therefore the course I would propose, my Lords, to take, would be to declare, that, with respect to the rents which were due from tenants, and which were received under the sequestration, and which were received by the judicial factor at and from Martinmas day after the 31st of July 1822, these should belong to the representative of Mr Vans Agnew, who was then entitled, as tenant in tail; and that if any of the parties, the respondents in that appeal, were in actual possession or occupation, and cultivated the land, they

were, according to the practice in the Courts of Scotland, founded in some degree on the civil law, but carried much further than the civil law, to pay rent for the land they so held and enjoyed. With that simple alteration, I should propose that that be the judgment of your Lordships. July 22. 1828.

Appellant's Authorities.—2. Stair, 1. 22. and 23.; 2. Ersk. 1. 21. 25. 35.; 4. Ersk. 2. 34. and 35. and 3. 5. 10.; 4. Bank. 45. 104.; 1. Stair, 9. 15. and 2. 12. 7.; 1. Bank. 8. 12.; Fonblanque on Equity, 2. 151.; Grant, Nov. 16. 1663, (1743.); Cardross, Jan. 3. 1711, (1747. and Rob. Appeal Cases, 37.); Rutherfurd, June 20. 1722, (1770.); Agnew, July 15. 1746, (1732.); York Building Company, March 8. 1793, and May 13. 1795, (13,367.); 6. Stair, 20, 21.; 6. Ersk. 1. 22.; 1584, c. 3.; 1621, c. 7.; 1663, c. 10.; 1681, c. 19.; 1695, c. 6.; 1. Ersk. 7. 38. and 41.; 1. Stair, 6. 44.; Thomson, July 3. 1781, (8985.); Cod. 5. tit. 71. § 16.; Cuningham, Feb. 19. 1635, (1738.); Gray, Feb. 23. 1672, (1755.); Milne, July 19. 1715, (1759.); Oliphant, Nov. 30. 1790, (1721.); Wedgewood, June 13. 1820, (not reported); Duke of Athole, June 20. 1822, (1. Shaw and Ballantine, No. 560.); Maberly, March 11. 1826, (4. Shaw and Dunlop, No. 362.); Wilson Bowman, March 29. 1802, (No. 4. App. Bona and Mala Fides).

Respondents' Authorities.—50. Dig. 16. 109.; 1. Stair, 7. 12.; 2. Stair, 1. 23. and 24.; 1. Bank. 8. 12. and 13.; 2. Ersk. 1. 25.; 4. Stair, 40. 21.; 1621, c. 18.; Mackenzie, July 1. 1752, (7443.); Bonny, July 30. 1760, (1728.); Grant, Feb. 9. 1765, (1760.); Lane, Jan. 17. 1782, (5179.); 4. Ersk. 1. 22.; Campbell's Executor, Nov. 20. 1815, (F. C.); 1. Stair, 6. 44.; 1. Bank. 7. 44.; 1. Ersk. 7. 34. and 41.; Lawrie, June 21. 1769, (1764.); Jackson, July 5. 1811, (F. C.); Duke of Roxburghe, Feb. 17. 1815, (F. C.); Turner, March 3. 1820, (F. C.); Potts, May 30. 1822, (1. Shaw and Ballantine, No. 499.; and 2. Shaw's Appeal Cases, 181.); Queensberry Cases, (2. Shaw's Appeal Cases, p. 43.); Moir, June 16. 1826, (4. Shaw and Dunlop, No. 438.)

J. FRASER—SPOTTISWOODE and ROBERTSON,—Solicitors.

JAMES BRYCE, JOHN DICKSON, and Others, *Appellants.* No. 16.

WALTER GRAHAM, *Respondent.*

Idiotry and Furiosity—Interdiction—Expenses—Law-Agent.—The Court of Session having appointed a curator bonis to a party alleged to be fatuous; and, on an application by him and his interdictors, (one of whom acted as his law-agent), having refused to recall the appointment, and repelled an objection that his fatuity could be ascertained only by the verdict of a jury; and having found both his interdictors and agent liable in expenses to the curator;—The House of Lords, after a remit to the Court of Session for the opinions of all the Judges, affirmed the judgment without costs.

THIS was the sequel of the case reported ante, Vol. II. p. 481. 26th May 1826, (which see). After it had been remitted to the Court of Session for the opinions of the whole Judges, as there July 23. 1828.

1ST DIVISION.

July 23. 1828. mentioned, and their Lordships had, by a majority, adhered to their judgment refusing to recall the nomination of the curator,* the House of Lords ordered and adjudged, that the interlocutors be affirmed, without costs.†

EARL OF ELDON.—My Lords, This was an appeal brought by John Dickson, Archibald Gibson, Andrew Steele, and James Knox, stating themselves to be interdictors of Mr James Bryce, who is represented to be sometime student of divinity, thereafter teacher of languages in Edinburgh, and the said Andrew Steele as his agent. The respondent was Mr Walter Graham, who was the curator bonis to James Bryce;—this gentleman, who had been sometime student of divinity, and thereafter teacher of languages, being, at the time these transactions took place, represented to be so weak in mind, and so unable to take care of his own affairs, as to make it necessary to execute an instrument, which, by the law of Scotland, is termed an instrument of interdiction,—an instrument by which he consents to do no act without the concurrence and consent of those four gentlemen who are named as interdictors.

My Lords,—The law of Scotland certainly allows a man to place himself in that situation. The books, I think, represent, that the principles of the law of Scotland is this, that a man who possesses a sufficient portion of reason to be conscious of the weakness of his own understanding, not furious or fatuous, but a man so satisfied that he ought not to trust himself with his transactions, may execute an instrument, binding him not to do any act with respect to his estate, without the consent of those persons whom, by the deed, he authorizes to superintend for him; or, in other words, without whose consent he binds himself not to act. I understand the law of Scotland to have permitted persons in that situation to which I have adverted, to place their affairs under the direction of others, in a mode which may be more pleasant to them than that of resorting, as originally it was thought necessary, to a suit, in order to pronounce that the individual was not a proper person who should be trusted to administer his affairs.

My Lords,—This instrument being executed, an application was made, on the death of a brother of this unfortunate gentleman Mr James Bryce, by a brother-in-law, a gentleman who had married his sister, to have a curator bonis appointed to take care of him, something in the nature of a committee of the estate. A medical gentleman, of the name of Abercrombie, certified that his state was such, that some person should be authorized to superintend him; and on an application to the Court of Session to appoint such a person, the Court of Session appointed Mr Graham, who was the husband of the sister.

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* See 6. Shaw and Dunlop, No. 148.

† Bryce, in the meanwhile, had died, and no farther hearing took place.

The first step taken in the Court of Session, desiring that that appointment might be recalled, was in January 1818; and on that occasion, the Court of Session pronounced this interlocutor, which is the first interlocutor appealed from:—'They refuse the prayer of the said 'petition, and assoilzie from the conclusions of the same, and decern: 'find the several interdictors, with whose consent the said petition has 'been offered, conjunctly and severally liable to the respondent in the 'expenses of process; appoint an account thereof to be lodged; 'and remit the same, when lodged, to the auditor to tax and report.' This is an appeal from this interlocutor, in respect of the expenses of the process,—an appeal by these four gentlemen who are the interdictors under this deed, this interlocutor finding them liable in the expenses of the litigation. My Lords, it appears that this order to pay the expenses of the process was resisted with respect to three of them, on the ground that they took no part in the business. There was a petition afterwards presented by Bryce himself. Mr Steele, one of them, also resisted, on the ground that he appeared only as agent for the interdictors. July 23. 1828.

My Lords,—In the petition made in the name of James Bryce, an application was made to the Court that there might be a process of cognition. That is a proceeding in the nature of our commission of lunacy, in order to determine whether this person was in that state in which it was proper that this curator bonis should be continued. Upon that petition the Court pronounced this interlocutor:—'They remit to 'the Sheriff-depute of the shire of Edinburgh to inquire concerning 'the condition of intellect and state of faculties of the petitioner James 'Bryce, and his abilities to manage and conduct his own affairs; and 'also concerning the truth and sufficiency of his grounds of complaint 'of harsh or improper treatment, or neglect of his comfort, on the part 'of Walter Graham, his curator bonis: authorize and direct the said 'Sheriff to proceed in the inquiry by personal visitation of, and inter-'course with the said James Bryce, at various times, and without pre-'vious warning or concert; as also, by examination upon oath of such 'witnesses, suggested by either party, who have sufficient cause of know-'ledge respecting the premises, and likewise by the opinion of medical 'persons named by the Sheriff to visit him: and ordain the said Sheriff 'to report his opinion on the said matters, and each of them, to the 'said Lords: and in case a minute shall be offered on the part of James 'Bryce, praying for a direction to the Sheriff to proceed on the said 'matter by jury or inquest, allow the clerk of process to receive and 'mark the same as part of the process, and allow the said curator 'bonis to answer the said minute, in case he shall see cause so to do.' Your Lordships therefore observe, that so far the Court of Session corrected its own original proceedings, by requiring a more minute and careful examination of the state of this person; and under the order of the Court, the Sheriff-depute of the shire of Edinburgh, (I believe the present Lord Advocate), proceeded to inquire into the state of this

July 23. 1828. person. The report of the Sheriff-depute, the present Lord Advocate, was to this effect:—'In compliance with the remit, the reporter called 'upon James Bryce, the individual therein referred to, on various 'occasions in the course of the last four months, without any previous 'warnings; and had also particular access to see him in the course of 'the examination of witnesses which has taken place under the above 'remit. The reporter also directed Doctors Spens, Farquharson, and 'Wood, to visit James Bryce, and has taken their examination upon 'oath, as well as that of the witnesses suggested by either party as 'having sufficient cause of knowledge respecting the premises; and he 'now begs leave to report, 1st, That from the appearance, manners, 'habits, and conversations of the above-mentioned James Bryce, it 'appears most decidedly to the reporter, that that person labours under 'a very great degree of mental imbecility, and that he is utterly in-'capable to manage and conduct his own affairs. This impression 'seems fully confirmed by the united opinions of all the medical 'men who have been examined, and is indeed supported by the whole 'other evidence which has been led; and which farther shews, that 'Bryce's defect of mind is not of recent origin, but has been progres-'sive for a period of nearly thirty years. This circumstance, while it 'almost excludes the hope of amendment, is calculated to remove all 'idea of the appearance which this person exhibits being produced 'from, or even affected by, the judicial proceedings which have been 'going on concerning him. Indeed, the reporter has had occasion, in 'the course of various cognitions that have gone on before him, to 'observe, that persons of deranged intellect are at times capable of 'assuming an extraordinary command over themselves, and can con-'trive so to speak and to act for a short space, as not unfrequently to 'induce juries to return verdicts in their favour, while the real state of 'the party would warrant a different deliverance. It particularly struck 'the reporter, as affording material evidence of the state of Bryce's 'mind, that in the course of the examination of witnesses, at which 'this person was present, he evinced no power of any such command 'over himself, nor could he even frequently be induced to keep silence, 'though recommended to him by those who were attending to his 'interest. With respect to the alleged maltreatment, it will be seen 'from the proof that this rests on no better ground than that of Bryce 'having for some time past made general complaints of that nature to 'certain individuals; a circumstance on which no reliance can be 'placed, as the making groundless complaints of this nature is a very 'usual symptom of, and attendant upon derangement. In so far as the 'reporter has been able to ascertain it, the conduct of Mr and Mrs 'Graham towards Bryce has been marked with all proper degree of 'kindness and attention, and he himself appears to have been sensible 'of this, and to have been satisfied and contented, until some indi-'viduals in the neighbourhood where he resided, possibly from humane, 'but certainly from mistaken motives, appear to have encouraged the

'suspicions of ill usage, which Bryce's state of mind was so much cal- July 23. 1828.
'culated to engender. With regard to his present residence, it ap-
'pears to the reporter that his room is good; that all due attention is
'paid to his comfort; and that Mrs Paterson, with whom he resides, is
'a person well calculated for such a charge.'

This report, my Lords, was dated in the month of December 1818, and it came under the consideration of the Court as early after that as February 1819. The report being prepared, but not actually brought before the Court, Mr Steele, declining any longer to continue agent to Mr Bryce, an application was made to the Court to appoint another, who was accordingly appointed. Your Lordships will observe the period, however, at which that appointment was made. The litigation had been conducted under the direction of Mr Steele, and he was considered by the Court liable to all the expenses as the agent who had carried on the business up to the month of December 1818: He ceased at that time certainly,—and on his application another agent was appointed; but he acted down to the period which elapsed between the remit to the Sheriff-depute and his report:—when the report was about to be prepared, and the consideration of it to be entered upon in the Court of Session, then he withdrew. The appeal therefore, my Lords, has, in my opinion, been brought quite irregularly by the four interdictors with regard to the first part of the case, in which they were all of them represented by Mr Steele; and with reference to the order made, that Mr Steele should pay the expenses till he ceased to be the agent previous to the last act of the Court of Session.

My Lords,—When this case came before the House of Lords some time ago, it struck me, and it likewise struck some other Lords not now attending the House, that this was a very extraordinary course of proceeding in its nature, comparing it with what is the course of proceeding in this part of the kingdom,—that a person should have applied to the Court of Session, and should have received immediately an appointment to take care of another and his affairs, on the ground that he was incapable of taking care of himself and his affairs;—that there should be no course of inquiry on the Court being so applied to, nor any notice given to the party;—and that this was at least a proceeding with reference to which this House should very well consider what the law of Scotland was, before it concurred in the proceedings which had taken place—particularly with reference to the care exercised on matters of this kind by the Chancellor of England; it being well known that the Court of Chancery cannot appoint any person to take care of a supposed lunatic or his property, unless a jury shall find that the man is of unsound mind; and that even after the finding of a jury that the party is of unsound mind, the Court will do nothing while a traverse is depending, the traverse allowing to those who are interested another opportunity of questioning the fact. But here, according to what is stated to be the law of Scotland, the Court proceeds in this

July 23. 1828. sort of way, to appoint a person to take care of the party, and to take care of him, according to the Act of Sederunt, 'in the mean time.' Whether these words, 'in the mean time,' really mean in the mean time till there is a more regular proceeding, or whether they mean that the appointment is made to continue until the man shall be able to manage for himself, may admit of question. The Act of Sederunt was certainly open to a different construction, according to what the different parties contended.

My Lords,—When this cause was heard, it was thought necessary by this House to desire the Court of Session to consider, whether they could take this course according to their law, or whether there was not a necessity for a cognition to issue in order to have the finding of a jury on the case. My Lords, we have since received the answer to that question so propounded by your Lordships,—and that is, that the Court have been in the habit of proceeding in this course for a very long period of years,—for so long a period that I do not think it is proper to advise your Lordships to hold that this is not a legal proceeding on their part. If it was a legal proceeding, I think your Lordships will see, that, attending to all the circumstances, and all the dates of these proceedings, it was not competent for this House to say that the interlocutor was wrong, or that it was not competent for that Court to say, whatever were the motives of Mr Steele, that he was liable as an officer of the Court, and as the party applying to the Court to set aside the proceeding, for the costs of the proceeding. I say there does not appear to me to be any reasonable doubt that the judgment of the Court ought, under those circumstances, to be affirmed; and however, according to the notion I have, I may regret the effect of it on these parties, who have been under a mistake, and not acting from improper motives, I rather think the best proceeding for your Lordships to come to is to affirm the judgment of the Court of Session, but to give no costs in the appeal case. The appointing a person to exercise the duties of curator bonis is taking a very considerable liberty, to be justified only by necessity; and this is the first case which has occurred in this House, in which the practice of the Court of Session has been established. That practice is not in conformity with the course observed in this country in the case of one who is represented, according to the language of the commission, as a lunatic. A commission is issued on a sufficient ground being laid, and even then, if the jury have found that he is a man of weak mind, that will not do; but if they find, not that he is lunatic, not that he is fatuous, but that he is of unsound mind, that is sufficient to sustain the commission. The way in which we have always proceeded is to issue a commission, and if the jury so find upon that representation that he is of unsound mind, the care of the Court is thrown around him. That, I think, would have been a fair notice. If that had been adopted, and these parties had then intervened, I think the appeal ought to have been dismissed with costs; but there having been no such proceeding in the first instance,

though it appears to me that it would be too much for your Lordships to say, that the proceeding of the Court of Session, and all the proceedings incident upon their proceedings for a long series of decisions, are such as cannot be upheld, I think that they ought to be affirmed without costs. I would therefore take the liberty of proposing that as the judgment of your Lordships. I cannot, however, conclude without saying, that I wish there was some law to regulate these proceedings in Scotland. July 23. 1828.

SPOTTISWOODE and ROBERTSON—A. MUNDELL,—Solicitors.

JOHN CRICHTON, Esq, Appellant and Respondent. No. 17.
Dean of Fac. Moncreiff—Sugden—Whigham.

ELIZABETH GRIERSON and Others, Respondents and Appellants.
Brougham—Fullerton—Keay.

Testament—Trust—Homologation.—Held, 1. (affirming the judgment of the Court of Session), in a question with the next of kin, that a mortis causa conveyance to trustees was valid, whereby a testator declared, 'That it is my wish that such 'remaining means and estate shall be applied in such charitable purposes, and in 'bequests to such of my friends and relations as may be pointed out by my said 'dearly beloved wife, with the approbation of the majority of my said trustees;' and, 2. That one of the next of kin having been named, and having accepted, and taken benefit under the deed, was not barred from claiming the residue, as belonging to him and the other next of kin.

JAMES CRICHTON, a Scotchman, went early in life to India, where he acquired a large fortune, and returned in 1806 to his native country, and purchased extensive landed properties in Dumfries-shire. He married Elizabeth, daughter of Sir Robert Grierson, baronet, and, by contract of marriage, provided her in an annuity of L.400 per annum, in case she should survive him. He had no children, but had a brother, John, and sister in Scotland. He had some distant relations in Scotland, and several cousins in America. July 25. 1828.

1ST DIVISION.
Lord Alloway.

On 12th November 1821 he executed a trust-deed and settlement in favour of his wife, so long as she should remain a widow, and of four other trustees, (among whom was his brother John), or a majority of them, 'who shall accept or act, or survivor of 'them, and who are hereby declared a quorum, and to such 'person or persons who shall be assumed as trustees as here-'after specified; and that in trust always, for the uses, ends, and 'purposes herein after specified, and contained in any instruc-

July 25. 1828. 'tions expressive of my will, to be executed by me as after-'mentioned, all and sundry lands,' &c. These trustees, or a majority of them, who should accept, or be assumed, he appointed his sole executors and universal legatees, and intromitters in trust with his whole personal estate. He then empowered them, in the event of their number being, by death or non-acceptance, reduced to two, to assume two or more trustees; authorized them to act either by themselves or factors; declaring that the trustees, 'whether acting as such, or as factors, 'shall not be liable to do diligence, or for solvency of debtors 'to my estate, or of purchasers from them, or for omissions of 'any sort, or in solidum, or jointly one for another, but each 'allenarly for what he or she shall actually intromit with and 'receive.' The purposes of the trust were, for payment of debts, deathbed and funeral expenses; the liferent of the lands of Friars-Carse and others, and L.1000 per annum, to his wife; an annuity of L.400 to his sister, and L.100 to her husband, if he survived her; to his brother, (the appellant), certain heritable property in Sanquhar, the fee-simple of the lands of Goosehill, (burdened with his sister's liferent), the fee of a freehold qualification in Dumfries-shire, and the lands and estate of Friars-Carse, subject to Mrs Crichton's liferent, (to be placed under fetters of a strict entail to heirs-male, whom failing, to any person to be named by the testator in his instructions); a legacy of L.400 per annum to the appellant's daughter, payable at majority; and certain legacies to some distant relations, and to his cousins in America, (who were also to be substituted to the heirs-male of his brother John in the entail of Friars-Carse). He also directed his trustees 'to make payment of L.200 sterling to each of the 'following charities, viz.—To the Infirmary of Dumfries, to 'the Royal Infirmary of Edinburgh, to the Lunatic Asylum of 'Edinburgh.' The deed then proceeded, 'And in regard I 'have not yet determined in what way and manner the farther 'distribution of my means and estate shall take place, I 'hereby reserve to myself power and liberty to make such distri-'bution at any time preceding my death, either in holograph 'instructions to my said trustees to be executed informally, with-'out the usual solemnities, or by a formal deed of instructions 'relative hereto; and in whatever way these instructions may 'be conceived, I hereby declare that the same shall be as valid 'and effectual, and shall be as much deemed and taken as a part 'of these presents, as if the same were herein verbatim engrossed: 'also declaring, that if my heir-at-law for the time being, or

'next of kin, shall attempt to quarrel or impugn these presents, July 25. 1828.
'or the future instructions to be given by me to my said trus-
'tees, then I hereby declare, that he, she, or they, shall forfeit
'all right and benefit to any provision out of my estate that may
'be conceived in his or her favour in virtue of these presents,
'or of any future instructions which I may give, as aforesaid.'
On the 20th of the same month he added a codicil, increasing his sister's annuity to L. 500; and then he declared, 'That in the
'event of my failing to make a distribution of my means and
'estate which shall remain after fulfilling the purposes before-
'specified, either by holograph instructions, though not formally
'executed, or by a formal deed of instructions, which I reserve
'to myself full power to do, then it is my wish, that such remain-
'ing means and estate shall be applied in such charitable pur-
'poses, and in bequests to such of my friends and relations, as
'may be pointed out by my said dearly beloved wife, with the
'approbation of a majority of my said trustees; and in the event
'of her decease, or entering into a second marriage, before such
'application shall have been pointed out and approved of as
'aforesaid, then I hereby empower the majority of the said
'remaining trustees to make the application in the way and
'manner they would conceive to be most agreeable to my wishes
'if in life.' From time to time he added other codicils, bequeathing legacies to his wife's brothers and sisters, and to other individuals, and 200 guineas to one of the trustees to buy mournings.

He died on the 3d May 1823, without having executed any instrument of instructions, so far as could be discovered, or made any other disposition of the residue of his personal estate, said to amount to L.100,000. The trustees accepted by the following minute:—'We, the undersigned, do hereby declare our accept-
'ance of the trust reposed in us by the deceased James Crichton,
'Esq. of Friars-Carse, conform to his deed of settlement, of date
'12th November 1821, and two several codicils annexed thereto,
'and shall execute the same to the best of our abilities.' This minute John Crichton signed, along with the other trustees; and it was alleged that he also took a conveyance to the heritage provided to him by the settlement, and concurred in a proposal made by Mrs Crichton, that Mr Manners, one of the trustees, should receive a sum as a friend in consequence of his giving up acting as factor.

Thereafter John Crichton took the opinion of Counsel as to the validity of his brother's settlement, and laid it before the trustees, intimating that his acceptance of, and acting under the

July 25. 1828. trust, should not infer any admission on his part that the residue of his brother's funds was legally disposed of by the trust-deed. He afterwards suggested, that an arrangement might be made as to the residue that would be satisfactory to all parties; but having received no answer to this proposal, he raised an action of declarator before the Court of Session, alleging that 'the said 'James Crichton, by the foresaid trust-disposition and settle-'ment, has not in any manner disposed of the residue of his 'means and estate after answering the special purposes expressed 'in the trust-deed, but has merely referred to some deed to be 'afterwards executed by him for that purpose; and that the said 'codicils do not contain any such certain and definite appoint-'ment as to be legally effectual for the disposal of the said 'residue, but that the words or clauses of the said codicil above 'recited, of 20th November 1821, having an apparent reference 'thereto, are so vague, indefinite, and uncertain, that they do 'not contain the legal expression of any precise will or intention 'of the testator with regard to the disposal of the said residue, 'and therefore are totally ineffectual for that purpose; and that 'in consequence thereof the said residue must belong to the said 'pursuer, and Mrs Margaret Otto, (his sister), as the nearest of 'kin of the said James Crichton;' and therefore concluding that it should be found and declared, that the said residue 'has not 'been disposed of by any valid or legal declaration of the will 'and intention of the testator, and that the words and clauses of 'the codicil (of 20th November) are not effectual in law for this 'purpose, but must be held to be void and of no effect in respect 'of their vagueness and uncertainty;' and that the trustees should be ordained to count and reckon with him, and pay to him his share of the residue.

The trustees stated in defence,—

1. That the pursuer had homologated and approved of the deed challenged, by acting under it as trustee, and claiming the subjects provided to him.

2. That the expressions of the codicil were sufficiently clear and explicit, and amounted to a definite and precise exposition of the legal will of the deceased; and referred to the case of Hill v. Hood or Burns, which was then depending before the Inner-House. The Lord Ordinary, 'in respect that a case, Hill v. 'Hood's trustees,* which is said to be similar to the present, is

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* 3. Shaw and Dunlop, No. 283.; and 2. Wilson and Shaw's Appeal Cases, p. 80.

'depending before the First Division of the Court,' appointed informations. Parties were then heard in presence,* and the Court, on the 12th May 1826, sustained the defences, and assoilzied the trustees from the conclusions of the declarator; and in respect they did not object, allowed the expenses to be charged against the trust fund.† July 25. 1828.

Both parties appealed,—the pursuer on the merits, and the defenders as to homologation.

‡*Appellant*, (*Pursuer*).—1. Every individual capable of disposing of his property, has a right to do with it as he thinks proper; but as the will is an act of the mind, it must be clearly and explicitly expressed; and if the deed in which it is embodied excludes the natural heirs, the law will jealously inquire if that expression has been distinct, both as to the subjects bequeathed and the legal disponees. Here the conveyance is to trustees. They are therefore bound to execute the specific instructions in the conveyance; and where there are no instructions, the trustees hold for the nearest of kin of the deceased. But the deceased has not effectually exercised the power reserved by him, of making a distribution of his means and estate, and this lets in the appellant and his sister to the right to the unapplied residue. No doubt the trustees say, that the deceased has delegated to them the power of distribution, and that such delegation is legal and

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* After the pursuer's Counsel had been in part heard, it was suggested that the defence of homologation should be first disposed of; and accordingly the Court took that point into consideration, and (24th February 1826) unanimously repelled that objection to the pursuer's title to insist in the action.

† See 4. Shaw and Dunlop, No. 364. where the opinions of the Judges are given.

‡ When the Counsel were called upon, Mr Sugden, as King's Counsel, proceeded to open the case for the appellant, whereupon Sir James Moncreiff, Dean of the Faculty of Advocates in Scotland, interrupted him, and stated to their Lordships, that though, from the circumstance of this case involving certain principles of law to which his learned friend had devoted particular attention, he had, in justice to their client, consented that Mr Sugden should lead, he begged their Lordships nevertheless to understand, that, as Dean of Faculty, he protested that, at the Bar of their Lordships' House, he had a right to take precedence of any King's Counsel.

Mr Sugden, in reply, said, that as one of the King's Counsel he claimed a right to lead the Dean of Faculty, and therefore he could not admit that his doing so now was to be considered as any act of favour or courtesy.

The Lord Chancellor said, the House would understand that the course followed in the present case would not be considered as any precedent, and that both the Counsel who had addressed their Lordships on this point had preserved their rights and privileges entire by their mutual protests.

July 25. 1828. effectual. But such doctrine is adverse to both Scotch and civil law. Legacies or provisions cannot be left to be disposed of pleno arbitrio tertii. Besides, the clause of the codicil is void on account of its vagueness and the uncertainty of its objects. To give a deed validity, the disponee, or party for whom the trustees hold, must be so pointed out as to confer a title and interest to require from the trustees the execution of their trust. But here there is neither individual nor corporation who could come into Court for that purpose. It is no answer that the appellant, as heir-at-law, has a title to insist for performance, or to correct mal-administration. He may have the title, but clearly he has no interest,—that has been declared by the very judgment giving efficacy to the codicil. In truth there is no human being who has a legal interest to ask the trustees a question, whether the trustees made a distribution, or did not appropriate the residue at all. The actio popularis is not recognized in Scotland; but even if the Lord Advocate appeared for the Scotch charities, he would be defeated by the trustees objecting, quomodo constat, that Scotch charities, rather than Indian, were contemplated, and that they meant to prefer the latter; nor could the Court exercise a controul, for such controul is only competent where there is somebody in whose favour the Court can decree performance, without placing itself in the room of the deceased, and exercising his unexpressed will. But here there is absolute uncertainty as to person, place, amount, proportion, time, or country; and the Court, instead of executing the will of the deceased, would be making a will for him. In whatever way the trust-deed is considered, it is inexplicable and inoperative, confused and uncertain. There is not only no party who has a title and interest to ask any thing, but there is no party who has a title or interest to object that any other party should not be the favoured person; so that, according to the doctrine of the respondents, they are under no controul, and must engross to themselves those funds which were put into their hands merely in trust. It is plain, however, that this cannot be permitted; and as there is no other party entitled to the funds, they must be held to belong to the nearest of kin. It is evident that the testator had no mind at all, and did not know to what precise purpose he wished to apply the undisposed proportion of his estate; and being thus destitute of will, neither trustees nor Court can supply that want. There is a marked and substantial difference between the present case and that of Hill *v.* Hood's trustees. It is in vain for the respondents to repeat, that they hold delegated powers,

and that any uncertainty as to the parties intended to be favoured will be removed the instant a distribution takes place; for a person cannot authorize another to make a will for him after his death, nor can he create a perpetual trust beyond all power of controul or challenge; and the same is the law of England and of Rome. July 25. 1828.

2. There is not the slightest ground for imputing to the appellant homologation as a bar to the action. He does not challenge the deed. He only inquires into what are its legal effects. And if any part is void from uncertainty, it is the same as if that part were non scriptum, and his right admitted as a matter of course.

1. *Respondents.*—The will and codicil involves no uncertainty regarding the testator's intention; on the contrary, he gives clear and distinct directions how the residue of his property is to be applied. This is not, therefore, a case of dubiety as to the meaning of the testator, which, when leaving an inextricable degree of uncertainty, may avoid a will; but a question, whether the explicit expression of intention is entitled to legal effect against the testator's heirs-at-law. Of this, however, there can be no serious room to doubt. The intention as expressed is perfectly consistent with the powers of a testator, as recognized in the law of Scotland, and must therefore receive effect. It is not essential to the validity of a will that there be an actual specification, either of the individual legatees, or of the particular charities which are to be benefited. There is no known rule of law by which a testament must contain such an appropriation as to confer, on the death of the testator, a jus actionis on one or more individuals, under the penalty of being held void for uncertainty. On the contrary, he may leave legacies absolutely, conditionally, or hypothetically; and there may, or may not, be an individual holding a jus actionis, or any patrimonial interest founding a title to insist for performance. All that can be objected in the present instance is, that, for the time, the effect of the legacy is suspended; but the instant the trustees make the election, then the interest vests, and the description is completed. The trustees are not here making a will, but carrying into execution the will made by the deceased. Besides imposing on them the ordinary duties of trustees, the testator empowered them to select, within a certain range of description pointed out by him to them, the particular persons and objects to be favoured; and the exercise of such a faculty was competent to the testator. The right of posthumous disposal is one of the rights attached to property, and

July 25. 1833. which, like any other right, may be delegated to a third party. The bequest would have been good if made to any person whom a third party pointed out; multo magis when the testator describes the very class from which the selection is to be made. It is not a delegation of testing, but of singling out an individual from a mass as to whom the deceased has tested. There is no vested interest in any individual, but the power so conferred affords the means of ascertaining who the individual is in whom the interest is to vest. There is no weight in the objection, that the trustees are exposed to no controul; for it is clear, that if they apply the residue to an object out of the range described by the testator, the next of kin would have a title and interest to interfere. But it is unnecessary to enter into the detail of arguments, for the point has been repeatedly tried, and the competency of the delegation of such a power has been often sustained, and particularly in Hill against Hood. To say that there is a possibility of abuse of power, is only saying what may be charged against every trust. Besides, the question here is not, whether there has been abuse, but whether they can legally execute the directions of the testator, and obey the confidence he reposed in them.

2. But, independent of these views, the appellant homologated the deed. It is no answer that he is not setting aside the deed, but only ascertaining its efficacy, and that, in inquiring whether it is void from uncertainty on one part, he does not repudiate it in others; for truly he is substantially challenging the deed; and even if this was a question of avoidance in respect of uncertainty, the appellant might, by homologation, bar himself from resting on that ground, as he could from any other.

The House of Lords 'ordered and adjudged, that the judg-'ments complained of be affirmed.'

LORD CHANCELLOR.—My Lords, In this case, in which Crichton is appellant, and Grierson and others are respondents, I will trouble your Lordships for a few minutes, while I suggest what I think ought to be the judgment.

My Lords,—This case arises out of a disposition of property made by a person of the name of James Crichton. James Crichton, early in life, went to the East Indies, where he accumulated a considerable fortune, and in the year 1806 returned to Scotland. In the year 1821, having, I believe, resided in Scotland during the whole of the interval, he made that disposition and settlement of his property which is the subject of the present suit. By that disposition and settlement he settled his property upon his wife during her widowhood, and upon

other persons in trust, for the special purposes mentioned in the deed. It is not necessary that I should trouble your Lordships by stating all the particular objects of the trust. One of the objects was to pay his debts and his legacies, and to make certain dispositions of his property, with reference to particular individuals mentioned in the instrument. He afterwards proceeded in the deed of disposition and settlement in these terms:—'And in regard I have not yet determined in what way 'and manner the farther distribution of my means and estate shall take 'place, I hereby reserve to myself power and liberty to make such 'distribution at any time preceding my death, either in holograph 'instructions to my said trustees, to be executed informally without the 'usual solemnities, or by a formal deed of instructions relative hereto.' This instrument was dated, I think, on the 11th of November in the year 1821. July 25. 1828.

Upon the 20th of the same month, he executed a codicil in these terms:—'I hereby declare, that in the event of my failing to make a 'distribution of my means and estate which shall remain after fulfilling 'the purposes before specified, either by holograph instructions, though 'not formally executed, or by a formal deed of instructions, which I 'reserve to myself full power to do, then it is my wish that such re-'maining means and estate shall be applied to such charitable purposes, 'and in bequests to such of my friends and relations, as may be pointed 'out by my said dearly beloved wife, with the approbation of a majority 'of my said trustees; and in the event of her decease, or entering into 'a second marriage, before such application shall have been pointed 'out and approved of as aforesaid, then I hereby empower the majority 'of my said remaining trustees to make the application in the way and 'manner they would conceive to be most agreeable to my wishes if in 'life.'

About a year, or a year and a half afterwards, he made a further codicil, in which he disposed of a farther part of his estate, and I believe a third codicil, at a subsequent period; but it does not appear to me necessary to advert to the dispositions in these two codicils. I do not think that they at all bear upon or affect the present question. The question turns entirely on the construction and validity of the clause to which I have called your Lordships' attention, and which is in these terms; if he makes no farther disposition:—'It is my wish that 'such remaining means and estate shall be applied in such charitable 'purposes, and in bequests to such of my friends and relations, as may 'be pointed out by my said dearly beloved wife, with the approbation 'of a majority of my said trustees; and in the event of her decease, 'or entering into a second marriage, before such application shall have 'been pointed out and approved of as aforesaid, then I hereby em-'power the majority of my said remaining trustees to make the appli-'cation in the way and manner they would conceive to be most agree-'able to my wishes if in life.'

The first point to which I will call your Lordships' attention is the

July 25. 1828. last part of this clause, for the purpose of getting rid of the argument that was urged at the Bar. It was contended, that whatever the construction might be of the former part of the clause, the latter gave an absolute power and controul to the trustees to dispose of the property, without regard to any limitation or condition whatever, except that they were to do it generally in the manner they might conceive most agreeable to the disponer's wishes, if in life; but I apprehend, my Lords, when the clause comes to be attentively considered, it does not bear that construction. He gives a power to the wife, with the approbation of a majority of the trustees, to dispose of the residue for particular purposes and particular objects; and the word made use of in that part of the clause is, that it shall be applied for particular objects and particular purposes, as pointed out in that clause. The disposer then goes on to say, that in the event of his wife dying, or of her marrying again, (by which she was to be deprived of the power of acting under this clause), those trustees, or the majority of those trustees, were to make the application in the manner they should conceive most agreeable to the wishes of the disposer, if in life. I apprehend, that, in point of construction, it refers to the former part; and when he talks of the application, it means that the trustees are to make such application, with regard to the objects before pointed out, in the way and manner the trustees should conceive to be most agreeable to the wishes of the disposer, if he had been then in life. I am quite satisfied that that is the true construction of the clause, from reference to the point to which I have adverted, and I mention that for the purpose of getting rid of that part of the argument, and of coming to that which is the whole question between the parties; namely, whether it is competent, —for that is the question,—whether it is competent for the disposer, by a deed of this description, to point out particular classes of persons and objects which are intended to be the object of his favour, and then to leave it to an individual, or a body of individuals, after his death, to select out of those classes the particular individuals or the particular objects to whom the bounty of the testator shall be applied. It is contended, that to give effect to the decision of the Court below, will be to allow a person to delegate to another the power of making a will for him, which is said to be directly contrary to the civil law, and directly contrary to the law of Scotland, which, it is said, is founded on the civil law. But I apprehend that that is not the way of considering that question. I cautiously abstain from expressing any opinion upon that point, which was adverted to in the course of the argument, and is much dwelt upon in the papers on your Lordships' table, because I think the question does not at all turn upon that position; that it narrows itself to this,—whether a party may, in the disposition of his property, select particular classes of individuals and objects, and then give to some particular individual a power, after his death, of appropriating the property, or applying any part of his property, to

any particular individuals among that class whom that person may select and describe in his will. July 25. 1828.

My Lords,—I apprehend that, according to the authorities in the law of Scotland, it is quite clear a party has this power; and I shall take the liberty of referring your Lordships to some of the authorities and cases upon this point, which have been cited at the Bar, and relied upon; and your Lordships will find that the current of authorities, I may say the whole current of authorities, tends to establish the affirmative of the position to which I have adverted, and to shew that the disponer of property in Scotland has the power of appropriating and disposing of his property in the manner I have pointed out.

My Lords,—The first case to which I shall refer, (because it is the earliest in point of date), is the case of Murray against Fleming, which was decided, I think, so far back as the year 1729. It is in these terms:—'A husband disponed his land estate to his wife in liferent, 'and to any of his blood relations she should think most fit, to be 'nominated by a writ under her hand, in fee.' Your Lordships find that the Court of Session decided, 'that this disposition granted by 'the husband to his wife did sufficiently enable her to nominate per-'sons to succeed to the subjects disponed; and that she having 'accordingly exercised that power, the persons named by her have 'right to succeed.' That, certainly, upon the first impression, is a strong case for the purpose of establishing the position to which I am adverting; but much ingenuity, and much talent, was exercised at the Bar, as was done throughout every part of the case, by the learned Counsel who appeared on the part of the appellant, and, with reference to the particular authority to which I have referred, great pains were taken, by looking into the original papers and proceedings in the cause, and adverting to the arguments of Counsel as detailed in those papers, to shew that the judgment of the Court was founded upon the consideration, that the wife had a constructive fee. Now, my Lords, I do not mean to say that it is impossible or even improbable that that should be the foundation upon which the Court proceeded; but still I find, that Lord Bankton, (who is a very competent authority), in his work, to which reference has been made in the course of the argument adverting to this case, and adopting its authority, does not put it upon that ground, or consider that the Court decided it upon that ground, but he represents it as decided simply on the ground of authority for the object in question being granted to the wife; and my Lord Kames, following Lord Bankton, in his valuable work on the Principles of Equity, considers the case as having proceeded upon the same ground.

But, my Lords, the point of law does not rest upon the authority of this case alone. The next case in point of time was the case of Brown against his relations. The disposition, my Lords, was in these terms:—'And the remainder of the proceeds of my said means and estate, 'after payment of the several legacies already bequeathed, or to be

July 25, 1828. 'bequeathed by me at any time of my life in manner foresaid, and of 'the payment of the expenses of executing this trust, to be divided 'amongst my poorest friends and relations whom I may have forgot 'herein, or in any other deed to be made by me in relation hereto, at 'any time during my life.' So that it was to be divided among his poorest friends and relations whom he had forgotten in that deed, or whom he might forget in any one of a similar description he might afterwards make. Now, my Lords, the judgment of the Court was in these terms:—'The Lords find, that by the trust-disposition executed 'by the deceased John Brown, his trustees are vested with a discre- 'tionary power to divide, amongst the poorest friends and relations of 'the said John Brown, the remainder of his estate, after payment of 'his debts and legacies, and the expenses of executing the trust, and that 'without distinction, whether the said relations are connected by the 'father's or by the mother's side, and also without distinction of 'degree:' so that your Lordships find in that case it was considered, that a discretionary power was, according to the terms of the disposition, vested in the trustees, to divide that portion of the property among the relations of the disponer, both on the father's and the mother's side.

My Lords,—A third case, to which I may also refer, for the purpose of establishing the same principle, is that of Snodgrass against Buchanan. That case was of this description; the dispositive clause was in these terms:—'Therefore, for love and other causes, I do 'hereby assign, dispone, and make over from me, to and in favour of 'the said Captain Alexander Buchanan, and the heirs of his body, or 'his assigns; whom failing, to such of my mother's relations as my 'kind and respected friend, Mrs Margaret Buchanan, widow of Dugal 'Buchanan, Esq. of Craigievairn, shall appoint by a writing under 'her hand; which failing,' &c. My Lords, I consider that as another authority tending to establish the same position. The argument that was urged at the Bar was, that in that case the question was not raised; but, my Lords, I consider that a strong circumstance tending to establish the position; for the cases to which I have referred had previously occurred. One was decided so far back as the year 1729, the other was decided at a subsequent period, both of them long anterior to the case to which I have referred; and when I advert a little to the manner in which the case to which I am now drawing your Lordships' attention, was contested by the activity and talent of Counsel, the circumstance of the point not having been raised in that case, can be explained only from a thorough conviction of all professional gentlemen at the time practising in Scotland, that the point was too clear for argument; therefore I consider, that, though the question was not raised in that case, the circumstances connected with the case tend strongly to confirm the position to which I have already called your Lordships' attention.

My Lords,—Another case was that of a disposition made by a person

of the name of Alexander Horn. The facts of the case I find stated in the speech on giving judgment delivered by the late Lord Gifford, in a case to which I shall presently direct your Lordships' attention. Alexander Horn disposed of his property, or a part of his property, to the Lord Provost and Magistrates of the city of Edinburgh, to be applied, according to their discretion, among the poor labourers of that city. That case was quoted for the purpose of establishing the position advanced by the late noble Lord to whom I have referred, in the case of Hill against Burns; and this case, my Lords, is another authority tending to the same point, because that property was disposed of in favour of a particular class of persons, out of whom a selection was to be made after the death of the disponer, by the particular individuals to whom that property was conveyed. July 25. 1828.

My Lords,—The case to which I have referred, in which the case of Alexander Horn was cited, was a case of Hill against Hood's trustees: that was a case, in the first instance, decided by the First Division of the Court of Session; and afterwards came before your Lordships' House; and the material part, the disposition of the party, was in these terms:—She appointed the residue of her estate to be applied by her trustees, and their foresaids, in aid of the institutions for charitable and benevolent purposes established, or to be established, in the city of Glasgow and its neighbourhood; and that in such way and manner, and in such proportions to the principal, the capital, or the interest or annual proceeds of the sums so to be appropriated, as to the trustees should seem proper; declaring, as she thereby expressly provided and declared, that they should be the sole judges of the appropriation of the residue for the purposes aforesaid. That case, my Lords, rested on the same principle, and was opposed on the grounds applied to the case now before your Lordships. Your Lordships were of opinion, upon the consideration of that case, that the decision of the Judges in the Court below was correct and proper; and their judgment was affirmed. I refer to that judgment, of which I have a report now lying before me of the speech delivered by the late Lord Gifford; and it is important in point of authority, for it is a case not standing by itself; for when that case had been argued at the Bar, and judgment was given, the noble and learned Lord took a review of the cases to which I have called your Lordships' attention; and the principle he extracted from those cases was the foundation of the judgment which he delivered. We are to consider, therefore, that those principles do not rest solely on the Courts in Scotland, but that they have passed under the review of your Lordships' House, and have been approved and sanctioned by your Lordships' House. Your Lordships extracted from them the principles on which the case of Hill v. Hood's trustees was decided; and I advert to the case of Hill v. Hood's trustees more particularly, because it was a material part of the foundation of the decision by the Court below in the case now before your Lordships. It was said at the Bar, that the case of Hill v.

July 25. 1828. Hood's trustees did not apply to the present. To be sure the facts of that case are different from those of the present case; but the principle of the case was the same; and when that case was cited by the learned Judges in the Court below, and referred to as an authority, they did not refer to the facts of the case merely as governing the present case, but to the judgment of your Lordships' House, to the principle upon which that was founded, and to the adoption of those authorities by your Lordships' House, which had never before passed in review before your Lordships: the principle extracted from those authorities they considered as the foundation of the judgment of this House, and they applied that principle to the case now before your Lordships.

Before, however, I state the conclusion which I draw from these cases, it is necessary for me to advert to one case which was cited on the other side. I think only one case was relied on in argument, opposing the current of authorities to which I have called your Lordships' attention, and that was the case of Dick v. Fergusson. It is unnecessary for me to enter into the detail of that case of Dick v. Fergusson, because it was commented on in the judgment to which I have referred; and after the facts of that case were commented upon before that noble and learned Lord, he was of opinion, and your Lordships adopted that opinion, that the decision in that case did not run counter to the authorities in the cases to which I have adverted. Thus much, however, I will say respecting that case. In that case the trustees refused to accept the trust or to act upon it; and in a note by Lord Kames respecting that judgment, he puts the decision upon this ground:—He says it was competent to the trustees in that case to have disposed of the property in favour of the heir-at-law. The effect of their not acting under the trust was to give the property to the heir-at-law,—they have, therefore, by so doing, declared their intention that the heir-at-law should take it; and considered in that view, it does not at all contravene the current of authorities to which I have called your Lordships' attention. I am justified therefore in saying, that the authorities are uniform upon this subject, and I am of opinion that they establish the position, that the trustees may dispose of this property among certain classes of persons, or among particular objects, subject to the intention expressed by the donor, the creator of the trust.

That being, my Lords, the general principle, another objection was made in this case as to the generality of the disposition. It was said, the property is to be given to such relations as the wife shall point out, with the approbation of the trustees. It was then said at the Bar, what is the meaning of the term relations? It is indefinite; and they even went so far as to say, in a certain sense, every man is the relation of every other man; but at all events the classes of the relations in the ascending and descending line are numerous and indefinite. My Lords, the answer I make is this, that in the cases to which I

have alluded that very point occurred; for instance, in that of Murray v. Fleming, the disposition was in favour of any of his blood relations she should think most fit to be nominated. Blood relations, therefore, would embrace all persons who were connected in blood with the disponer,—a body of persons as extensive as it was possible to conceive, and yet in that case the Court were of opinion that the disposition was good. In the next case to which I adverted, that of Brown and his relations, the disposition was to poor friends and relations, which the Court considered to embrace relatives both on the father's and on the mother's side;—the objection, therefore, was as open in that case as in the present, and yet the Court decided it in the manner I have mentioned. Again, my Lords, in the case of Snodgrass v. Buchanan, the disposition was to the disponer's mother's relations, being again as extensive as it was possible for a disposition to be. The objects were relations. In none of these cases did the objection prevail; and it did not prevail, because a particular individual was pointed out as the person who was to select among the class, and to point out those among the relations who were to take. July 25. 1828.

My Lords,—The same objection in point of principle will apply to those dispositions which were made in favour of charitable institutions, and in respect of those the same answer has been given. It is remarkable, that, in the second case to which I have referred, the disposition was to the poorest friends and relations of the disponer, and that was considered a valid disposition; and in respect to charitable purposes, according to the law of England, which, as to bequests of this kind, is more strict than the law of Scotland, that would be a valid disposition.

For these reasons, my Lords, after carefully attending to this case, —after considering the most elaborate argument of the Bar, from a gentleman who never omits, in the course of his address, any argument which can be useful to his case,—I mean the Dean of Faculty,— looking to those authorities, and to what your Lordships did in the case of Hill v. Hood, I must suggest to your Lordships the propriety of affirming the decision of the Court below in this case. I would humbly move your Lordships, that this judgment of the Court of Session be affirmed.

Appellant's Authorities.—Dig. lib. 11. § 7. de leg. 3. et seq.; Voet, 28. 5. 29.; Pothier, de Test. 8. § 1. and 2.; Voet, 30. 1. 36.; Domat, 2. 3. 1. § 1.; 3. Ersk. 9. 6. and 8.; Balfour, tit. Exec. p. 220.; Dirleton, p. 73.; Stewart, p. 74.; 3. Ersk. 9. 8. and 3. 1. 42.; 1. Stair, 13. 7.; 2. Swinburne, p. 463.; 2. Vin. tit. 20. de Legatis; 2. Craig, 3. 14.; Com. of Berwickshire, June 18. 1678, (1351.); Trades of Edinburgh v. Heriot's Hospital, Aug. 9. 1765, (5750.); Christie, July 6. 1774, (5755.); Campbell and M'Intyre, June 12. 1824, (3. Shaw and Dunlop, No. 93.); Kames' El. p. 213.; 3. Ersk. 9. 14.; Campbell, June 26. 1752, (7440.); Dalzell, March 11. 1756, (16,204.); 9. Vesey, p. 399. and 404.; Hepburn, Feb. 13. 1699, (7428.); Buchanan, July 23. 1629, (671.); Hamilton, Feb. 23. 1681, (672.); Sholee, Jan. 1684, (672.); Corsan, Feb. 19. 1734, (673.); Campbell, Nov. 22. 1739, (674.);

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Earl of Rothes, Jan. 21. 1823, (2. Shaw and Dunlop, No. 130.); Mills v. Farmer, (19. Vesey); Saunders on Uses, p. 210.; Lovelass on Wills, p. 191. edit. 1823; Merivale's Reports, vol. 3. p. 17.; 3. Bankton, 8. 45.; 7. Vesey, p. 51.; 1. Brown, p. 179.; 2. ib. p. 229.; Swanson, Rep. 201.; 9. Vesey, 399.; 10. Vesey, p. 538.; 1. Simon and Stewart, p. 69.; Turner's Reports, Ommancy, July 22. 1825.

Respondents' Authorities.—Dirleton, p. 73.; Murray, Nov. 28. 1729, (4075.); Campbell, Dec. 16. 1738, (4076. and Elchies' Dec. No. 14. Mut. Con.); Dick, Jan. 22. 1728, (7446.); Brown, Aug. 3. 1762, (2318.); Buchanan, Dec. 16. 1806, (No. 1. Ap. Service); Hill, Dec. 14. 1824, (3. Shaw and Dunlop, No. 283.): affirmed, House of Lords, April 14. 1826, (2. Wilson and Shaw's Rep. House of Lords, No. 11. p. 80.)

MONCREIFF, WEBSTER, and THOMPSON—A. GORDON,—Solicitors.

No. 18.

Sir HUGH MUNRO, Bart., Appellant.—*D. of Fac. Moncreiff—Sugden.*

GEORGE MUNRO, and Others, Respondents.—*Brougham—Keay.*

Entail.—Held, (affirming the judgment of the Court of Session), 1. That the omission of the words 'for new infeftment' in an entail made in form of a bond and procuratory of resignation is not fatal to it, the deed being otherwise sufficiently expressed; 2. That a declaration, that in case an heir substitute succeed to another estate requiring the assumption of a name and title inconsistent with those provided by the entail, he shall execute a conveyance of the entailed property to the next heir, subject to the fetters, does not free an heir not taking under such conveyance,—the fetters being held, on a sound construction of the whole clause, to apply to the heirs universally; and, 3. That a declaration that debts and deeds shall be null and void, so far as they affect the estate, is sufficient, without declaring that they shall be null and void as against the contravener.

July 25. 1828.

1ST DIVISION. Lord Eldin.

SIR HARRY MUNRO, proprietor of the estate of Fowlis, executed, in 1776, a deed of entail, in form of a bond of taillie and procuratory of resignation, whereby he bound and obliged himself, and his heirs whatsoever, to 'make due and lawful resignation of 'all and sundry my lands, &c. in the hands of my immediate law-'ful superiors of the same, to be made, given, granted to myself; 'whom failing, to the said Hugh Munro, my eldest lawful son, 'and the heirs of his body;' whom failing, certain substitutes; 'but with and under the reservations, conditions, provisions, 'restrictions, limitations, clauses irritant and resolutive, powers, 'faculties, and declarations after-mentioned, and no otherwise;' and for that end he constituted procurators 'for me, and in my 'name and behoof, duly and lawfully to resign and surrender,

'upgive, overgive, and deliver, all and sundry the lands after- July 25. 1628.
'mentioned, &c. in the hands of my immediate lawful superiors
'of the same, or of their commissioners in their names, having
'power to receive resignations, and to grant new infeftments, to
'be made and granted to me, the said Sir Harry Munro, my-
'self; whom failing, to Hugh Munro, my eldest lawful son, and
'the heirs-male of his body; whom failing,' to the substitutes as previously called,—'with and under the several conditions, pro-
'visions, restrictions, limitations, clauses irritant and resolutive,
'powers, faculties, and declarations after-written, and no other-
'wise,—viz. with this condition always, as it is hereby expressly
'provided and declared, that the whole heirs of taillie and sub-
'stitutes, both male and female, particularly and generally above-
'mentioned, and as well general as of taillie, and the descen-
'dants of their bodies so succeeding and enjoying the said lands
'and estate, shall be obliged, in all time from and after their
'succession to the said lands, barony, and others above-men-
'tioned, and also the husbands of the heirs-female so succeeding
'and enjoying the said estate, to assume, use, and bear, and
'constantly retain the surname, arms, and designation of Munro
'of Fowlis: and declaring, as it is hereby expressly provided and
'declared, that in case any of the heirs and substitutes above-
'mentioned, succeeding as above, whether heirs general or of
'taillie, shall happen to succeed to any other title or dignity,
'whereby the surname, arms, and designation of Munro of
'Fowlis might be totally sopited, or succeed to any other taillied
'estate, whereby they may be disabled from carrying the said
'arms, name, and designation of Munro of Fowlis; that then
'and in such case, the heir so succeeding to such title, or accept-
'ing of such taillied estate, shall be bound and obliged respec-
'tively, and from time to time, in all time coming, to denude
'and divest himself or herself of the aforesaid lands, barony,
'teinds, and others above disponed, in favours of the next heir
'of taillie for the time, to whom the said lands and others above-
'mentioned are hereby declared to pertain and belong, but with
'and under the reservations, conditions, provisions, restrictions,
'limitations, clauses irritant and resolutive, powers, faculties,
'and declarations contained in this present right, &c.: And
'with and under this limitation and provision, as it is hereby
'expressly provided and declared, that the lands, barony, teinds,
'and others above resigned, shall not be affected nor burdened
'with, nor subject nor liable to be apprised, adjudged, or any

July 25. 1828. 'ways attached, burdened, or evicted, for or by the debts or 'deeds of any of the heirs aforesaid, or substitutes, whether 'general or of taillie and provision, male or female, before-men- 'tioned, who shall succeed to the same, due or granted prior to 'such succession, or by any debts or deeds which may be con- 'tracted after such succession, as after expressed.' Then it is provided and declared, that it shall not be lawful to nor in the power of any of the said heirs, whether general or of taillie or provision, male or female, to alter the order of succession, sell or burden the lands, or do any other act whereby the taillied lands might be affected, or the bond of taillie, or order of succession, hurt or changed. The whole heirs and substitutes, general and particular, are taken bound to possess the taillied estate by virtue of the taillie, and by no other right or title, and to insert the whole restrictions, limitations, clauses irritant and resolutive, of the taillie, in all the charters, infeftments, &c. to follow thereon. Then follows this irritant and resolutive clause, 'And with and under the irritancy following, as it is hereby ex- 'pressly provided and conditioned, that in case any of the heirs 'general or of taillie, particularly and generally before-mention- 'ed, or the husbands of the heirs-female, shall contravene the 'aforesaid conditions, provisions, restrictions, and limitations, 'and others before expressed, and herein contained, or any of 'them, that is, shall fail or neglect to obey or perform the said 'conditions and provisions, and each of them, or shall act in the 'contrary of the said restrictions or limitations, or any of them, 'that then, or in any of these cases, not only all such acts, facts, 'deeds, and debts contracted, done, or committed contrary 'thereto, or to the true intent and meaning thereof, with all that 'may follow thereon, shall be in themselves void and null, and 'of no avail, force, strength, or effect against the other heirs of 'taillie, and the said lands, barony, and others above-mentioned, '(which or no part thereof shall not be anywise burdened there- 'with), in the same manner as if such debts, deeds, omissions, or 'commissions, had not been contracted, done, or granted, or had 'never happened; but also the person or persons so contraven- 'ing, by failing to obey the said conditions, or acting contrary 'to the said limitations, or any of them, as aforesaid, shall, for 'him or herself allenarly, ipso facto amit, lose, and forfeit all 'right, title, or interest, which he or she hath to or in the said 'taillied lands and estate, and the same shall become void and 'extinct; and the said taillied lands and estate shall devolve,

'accrue, and belong to the next heir of taillie appointed to suc- July 25. 1828.
'ceed, albeit descended of the contravener's own body, and in
'the same manner as if the contravener was naturally dead,'
&c.

Sir Harry died in 1791. His eldest son, Sir Hugh, served heir of taillie to him on the 13th of May of the same year,—executed the procuratory in the taillie,—and obtained a Crown charter in terms of the deed, containing the following quæquidem clause:—'Quæquidem terræ baroniæ, decimæ, aliaque suprascript. per-'prius hæreditarie pertinuerunt ad dict. Dominum Henricum 'Munro,' &c. 'per illum ejusque legitimos procuratores, ejus 'nomine ad hunc effectum specialiter constitut. virtute procura-'toriæ resignationis antea et postea mentionat. super diem et 'datam præsentium, debite et legitime resignatæ fuerunt in 'manibus dicti Domini Capitalis Baronis pro seipso ac in nomine 'remanen. Baronum Nostri dict. Scaccarii, tanquam in manibus 'Nostri immediati legitimi superioris earund. pure et simplicites 'per fustim et baculum uti moris est in favorem et pro novo in-'feofamento earund. dict. Domino Hugoni Munro, et hæredibus 'masculis ex ejus corpore, quibus deficien. aliis hæredibus talliæ 'et provisionis supra mentionat. secundum ordinem successionis 'supra specificat. faciend. et concedend.; sed cum et sub sin-'gulis conditionibus, provisionibus, restrictionibus, limitationibus, 'clausulis irritan. et resolutivis, potestatibus, facultatibus, et 'declarationibus, reservationibus, aliisque supra mentionat. et non 'aliter; idque virtute et secundum procuratoriam resignationis 'et talliæ dict. terrarum baroniæ decimarum aliorumque prædict., 'concess. per dict. Dominum Henricum Munro,' &c. In virtue of this Crown charter he took infeftment and entered into possession of the estate. Conceiving that he was not bound by the fetters, he raised, in 1824, an action of declarator, subsuming, 'that, in consequence of the death of Sir Harry, the 'succession to the lands, and barony, and others, devolved on the 'pursuer, and belonged to him as proprietor: that he had right 'to the lands, barony, and others, as absolute and unlimited fiar, 'and was entitled to sell, dispose of, and burden them, to alter 'the order of succession, and exercise every other act of owner-'ship regarding them, as fully and freely as if the deed of entail 'had never been made or granted;' and concluding that 'it ought 'and should be found and declared, by decree of the Lords of 'our Council and Session, that the pursuer is the absolute and 'unlimited fiar or proprietor of the lands, barony, and others 'before-mentioned, and that the reservations, conditions, pro-

July 25. 1828. 'visions, restrictions, limitations, prohibitions, clauses irritant 'and resolutive, powers, faculties, and declarations, contained in 'the said deed of entail, do not in any way affect him, or limit 'his right to the said lands, barony, and others before described; 'and that the pursuer is entitled to sell, alienate, and dispone the 'said lands and others, to burden and affect the same with debt, 'to alter, vary, and change the order and course of succession 'as contained in the said deed of entail to the said subjects, and 'to exercise every act of ownership, and to do all acts, facts, and 'deeds, and to contract debts, as fully and freely as if the said 'deed of entail had never been made and granted; and that all 'such acts, facts, deeds, and debts contracted, done, or commit-'ted by the pursuer, contrary to the aforesaid conditions, pro-'visions, restrictions, limitations, prohibitions, and other clauses 'before specified, shall be as valid and effectual, and of as much 'avail, force, strength, and effect, as if the said deed of entail 'had not been made or executed,' &c. The Lord Ordinary repelled the defences, (the substance of which will be found in the argument of the respondents); but the Court (15th February 1826) altered, and assoilzied the defenders, but found no expenses due.*

Sir Hugh Munro appealed.

Appellant.—1. The deed of entail is drawn in the form of a procuratory of resignation; but from the manner in which it is expressed, there is no warrant for any new title to be granted by the superior in favour of the heirs of entail. The deed does not state what the superior is to give to the heirs. The granter, no doubt, binds himself to resign the lands, and to resign them in the hands of his lawful superiors; but he has not said what is to become of them after they are so resigned. The words, 'for 'new infeftment,' have been left out, and this omission leaves the instrument as completely ineffective to the purpose of creating or obtaining a title by new infeftment from the superior, as if there had been no obligation to resign at all. It is no answer to say, that this may have been a clerical error; for this is a question concerning the conveyance of a land estate,—a question on a title of property—on an act of technical conveyancing; and the inquiry must be, not what Sir Harry intended to do, but what he did.

2. The prohibitory, irritant, and resolutive clauses in this deed, or the clauses intended to be of this nature, are so expressed in

* 4. Shaw and Dunlop, No. 306.

the connexion in which they stand, as to be altogether inoperative, in as far as the appellant's title can be affected. Deeds of this description must be strictly construed. But although it is declared by the irritant clause, that all acts, facts, deeds, and debts contracted or committed contrary to the terms of the entail, were to be in themselves void and null; yet there is no declaration that they shall be so against the contravener, a declaration essential by the statute 1685, c. 22. No doubt the entailer has declared, that the heirs and substitutes succeeding to any other title or estate, whereby the surname, arms, and designation of Munro of Fowlis might be totally sopited, should grant conveyances to the next substitute in the order of the entail, and that in these conveyances there should be inserted all the fetters of the entail; still this insuperable defect exists, that these fetters were not declared to affect the right, either of the pursuer, or any other of the heirs who should not so happen to succeed to any such title or estate. This cannot be rectified by picking out phrases in posterior clauses that seem to have relation to all the heirs; for this is not a mode of construction permitted in entails: and besides, the posterior clauses only could apply, under the operation of the event of an heir denuding, in consequence of his succession to a title or dignity. The respondents contend, that the general clause brought, or rather was intended to bring, the heirs succeeding, after a case of denuding, under the prohibitions and irritant clauses following. But the question is, whether, without doubt or ambiguity—in language apt, definite, precise, and clearly connected—the fetters are imposed in the manner contended for by the respondents. If it were no more than confessed that the clause fairly admits of two meanings—nay, if the deed is so framed, that the Court cannot, without commentary and reasonings derived from the style and form of other entails, determine with certainty, not merely the intention to restrain in a sufficient manner, but the technical precision of the restraining clauses—the very statement of this as the nature of the case, would be, on every principle of law, fatal to the sufficiency of the entail. But the case is stronger; for the respondent can only reach this conclusion by violating every principle applicable to the fair construction of deeds. July 25. 1822.

3. The irritant clause in the entail, or what was intended to be an irritant clause, is not so expressed as to annul onerous deeds done, or debts contracted in contravention of the prohibitory clause. They are not declared null ab initio, but only against the other heir of entail, and the said lands. They should,

July 25. 1828. to give effect to the irritant clause, have been declared in themselves null and void.

Respondents.—The objection to the form of the procuratory rests on a mere clerical error, and does not invalidate the deed; for, as the clause is expressed, there are words sufficient to warrant the resignation of the lands in terms of the procuratory.—'To give and grant infeftment of the lands,' and 'to give and 'grant the lands,' are, in an instrument of this kind, completely synonymous; and on accepting a resignation from his vassal, a superior would be as effectually tied down by the one set of words as by the other. Besides, the expressions which follow, although elliptical, import the granting of new infeftment in favour of the resigner and the heirs called. But the objection is inadmissible in the present action. The appellant executed this very procuratory, and holds the estate by that title. The very charter he accepts from the Crown sets forth, that the lands were 'duly and lawfully resigned,' &c. A declarator, therefore, was quite out of place, even if the appellant had not, by homologation, abandoned the objection.

Next, the appellant maintains, that the prohibitory, irritant, and resolutive clauses do not affect him; and that the present deed is not in itself an entail under irritant and resolutive clauses, but merely an injunction, that an entail of that kind shall be made in a certain event, which event, he says, has not yet arrived. But when the deed is carefully perused, the construction attempted to be forced on very clear words, becomes palpably untenable; for the deed of entail destines the lands to a series of heirs, with complete and effectual prohibitory, irritant, and resolutive clauses, directed in express terms against the whole heirs and substitutes called by the deed, and the appellant among the number. There is no doubt that fetters must be clearly expressed, and they have here been so. It is the appellant who would get quit of the fetters upon a bare problematical possibility, and apply rules of interpretation which have no authority in law. The respondents only demand a reading according to the ordinary rules of law and grammar. They neither rest their case on implication nor presumed intention, but on the obvious and legal meaning of the words themselves.

Then, as to the irritant clause, the objection is equally groundless. The Act 1685 does not require that the prohibited acts and deeds shall be declared null and void against the contravener himself, but that the deeds are 'in themselves null and void.' No doubt, the acts and deeds are, in the present case, declared

to be of 'no avail, force, or effect, &c. against the other heirs 'of taillie;' but it does not from thence follow, that there is not a declaration of nullity against the contravener himself, even if that declaration should be necessary, which it is not. July 25. 1828.

The House of Lords ordered and adjudged, 'that the appeal 'be dismissed, and the interlocutor complained of affirmed.'

LORD CHANCELLOR.—My Lords, There is another case which was argued some time since at your Lordships' Bar, the case of Munro against Munro. This case turns upon the construction of a Scotch deed of entail. Objections were made in point of form to the procuratory of resignation, and also to the irritant and resolutive clauses of the deed. I attended minutely to the arguments on both sides at the time they were advanced. I have since looked into the case with great care and attention, and have read the instrument over and over again, and bestowed very considerable attention upon it; and have also looked into all the authorities cited at the Bar which appear to bear upon the case; and keeping, at the same time, in mind, the principle applicable to instruments of the kind, that they are to be strictly construed—keeping that in mind, and looking at the instrument, after the best consideration I have been able to give to it, I am bound to say, that I feel no reasonable doubt with respect to the construction of it. Without, therefore, going into the arguments upon the subject, which might occupy your Lordships a considerable time, and would not be very intelligible unless the instrument were before you, I should recommend to your Lordships that the judgment of the Court below be affirmed.

Appellant's Authorities.—Henderson, June 10. 1795, (4489.); Ross, July 4. 1809, (F. C.); Robertson, Feb. 16. 1816, (F. C.); Rowand, June 30. 1824, (3. Shaw and Dunlop, 141.); 3. Ersk. Inst. 8. 29.; Edmonstone, Nov. 24. 1769, and House of Lords, April 15. 1771, (4409.); 2. Bank. Inst. 149.; Bell's Cases, 188.; Erskines, Feb. 14. 1758, (15,461.); Gordon, July 8. 1777, (15,462.); Wellwood, Feb. 23. 1791, (15,463.), and May 31. 1797, (15,466.); Marchioness Titchfield, May 22. 1798, (15,467.); and House of Lords, Jan. 20. 1800; Miller, Feb. 12. 1799, (15,471.); Brown, May 25. 1808, (19. App. Taillie); Henderson, Nov. 21. 1815, (F. C.); Syme, Feb. 27. 1799, (15,473.); and House of Lords, April 26. 1803, (No. 1. App. Tailzie); Bruce, Jan. 15. 1799, (15,539.); Dalziel, May 30. 1809, (F. C.); Mowat, Feb. 6. 1823, (2. Shaw and Dunlop, No. 170.); Dick, Jan. 14. 1812, (F. C.); Adam, May 18. 1821, (1. Shaw's App. Cases, No. 8.); Hope's Minor Practics, 404. 407.; 3. Mack. 8. 3.

Respondents' Authorities.—Syme, Feb. 27. 1799, (15,473. and House of Lords, April 26. 1803, 5. App. Taillie); Steele, May 12. 1814, (F. C.); Douglas, Nov. 14. 1823, (3. Shaw and Dunlop, No. 476).

MONCREIFF, WEBSTER, and THOMPSON—RICHARDSON and CONNELL,—Solicitors.

No. 19. J. M'CULLOCH, and Others, Appellants.—*Adam—Greenshields—Pyper.*

Sir ALEXANDER MUIR M'KENZIE, Bart. Respondent.
Sol.-Gen. Tindal—A. Bell—Keay.

Title to Pursue.—Held, (affirming the judgment of the Court of Session), 1. That a party pursuing, as heir of entail in possession, a reduction of a sale of part of an entailed estate, sold under a private Act of Parliament and relative decree of the Court of Session, had no title to pursue, in consequence of having made up his titles to and possessed the entailed estate in contravention of the original entail on which he founded his action; and, 2. That the principal pursuer having concluded that the defender should deliver up the lands to the pursuer, as heir of entail in possession, the substitute heirs of entail, who insisted with him in the same summons, were also barred.

July 28. 1828.

2D DIVISION. Lord Cringletie.

JOHN M'CULLOCH (who may be called the first) of Barholm, executed certain deeds of settlement of that estate in favour of his grandson, John M'Culloch the second, whom failing, on a certain series of heirs. These deeds John M'Culloch the second (under a contract with his sister) reduced, and executed a strict deed of entail, on the 29th December 1762, which was recorded on the 13th January 1763, granting the lands of Barholm and others, in favours and for new infeftment of the same, 'to be 'made, given, and granted in due and ample form, to me, the 'said John M'Culloch, in liferent, and to John M'Culloch, my 'eldest son, and the heirs-male of his body; whom failing, to 'the heirs-female of his body; whom failing, to William 'M'Culloch, my second lawful son, and the heirs-male of his 'body; whom failing, to the heirs-female of his body; whom 'failing, to Henry M'Culloch, my third lawful son,' and a long series of substitutes. The entail then provided, that 'it shall 'not be lawful to nor in the power of the said John M'Culloch, 'my son, nor any of the heirs of taillie and provision, male or 'female, appointed by me, to alter, innovate, or change this pre-'sent taillie and order of succession before prescribed, or to be 'prescribed by me, by any nomination, or other deeds, as afore-'said, nor to do any other deed that may import or infer any 'alteration, innovation, or change of the same, directly or in-'directly.' Further, the deed, after the prohibitions against selling or contracting debt, required 'that the said John 'M'Culloch, my eldest son, and whole heirs general or of taillie, 'named, or to be named by me, shall possess and enjoy the said 'taillied lands and estate by virtue of this present taillie or no-

'mination to be made by me, infeftments, rights, and conveyances to follow thereupon, and by no other right or title whatever; and that the said John M'Culloch, my son, and the whole heirs general and of taillie, named, and to be named by me, shall be obliged to obtain themselves timeously entered, infeft, and seized in the said lands and estate, and not to suffer the same to lie in non-entry, and also to cause engross and verbatim insert the whole order and course of succession herein contained, and to be contained in the nomination to be granted by me as aforesaid, and the several conditions, limitations, provisions, irritancies, and others contained in this present taillie, in the instrument of resignation, charters, and infeftments to follow hereon, and in all subsequent procuratories and instruments of resignation, charters, services, retours, precepts thereon, precepts and instruments of sasine, and other conveyances of the said taillied lands and estate.' It was then declared, that all deeds granted contrary to the prohibitions of the entail shall be void and null; after which there occurred this clause:—'The person or persons contravening, by failing to obey the said conditions, or acting contrary to the said prohibitions, or any of them, shall, for himself or herself only, ipso facto amit, lose, and forfeit all right, title, and interest, which he or she hath to the said lands and estate; and the same shall become void and extinct, and the said taillied lands and estate shall devolve, accresce, and belong to the next heir of entail, albeit descended of the contravener's own body, in the same way as if the contraveners were naturally dead.' On this entail titles were completed in favour of the entailer, John M'Culloch the second, in liferent, and his son, John M'Culloch the third, in fee. July 28. 1828.

John M'Culloch the second having contracted debts both before and after the completing of this entail, he and his son adopted various methods to defeat it, but unsuccessfully. They then applied to Parliament, and obtained a private Act, for the purpose of selling part of the entailed estate for payment of the debt contracted prior to the completing of the entail; and an action of declarator, sale, and ranking, was thereupon brought in the Court of Session by John M'Culloch the second, John M'Culloch the third, and by the latter as administrator-in-law for Anne M'Culloch, his infant daughter. It is unnecessary to detail the precise steps which followed, but the result was the sale of a large proportion of the estate, of which a considerable

July 28. 1828. part was bought by George Muir, (the father of the respondent, Sir Alexander Muir M'Kenzie), who was infeft under a decree of sale in 1777 and 1783.

John M'Culloch the second having died during the dependence of the action, the residue of the estate came to John M'Culloch the third, who, as 'heritable proprietor of the lands 'and others underwritten,' executed, on the 18th January 1791, a procuratory of resignation for new infeftment in the remainder of the estate, 'to be made, given, and granted, in due and am-'ple form, to me the said John M'Culloch in liferent, and to 'John M'Culloch, my eldest lawful son, and the heirs-male of 'his body; whom failing, to the heirs-female of his body; whom 'failing, to James Murray M'Culloch, my second lawful son, 'and the heirs-male of his body; whom failing, to the heirs-'female of his body; whom failing, to William M'Culloch, my 'third lawful son, and the heirs-male of his body; whom failing, 'to the heirs-female of his body,'—and so forth, to his other sons and daughters; and he then called the substitutes in the entail of 1762. A Crown-charter followed on the 13th December, by which the lands were conveyed 'semper cum et 'sub diversis oneribus, conditionibus, provisionibus, restric-'tionibus, limitationibus, clausulis irritan. et resolutivis, reser-'vationibus aliisque content. in literis dispositionibus tallise, 'lie deed of entail, de data 29no. die mensis Decembris Anno 'Domini 1762, et registrat. in Archivo Talliarum de data 13. 'die mensis, postea script. quarum omnes in resignationis in-'strumento cartis et sasinæ instrumentis super presentibus se-'quend. et in omnibus subsequend. servitiis retornatibus pro-'curatoriis, et resignationis instrumentis, cartis, præceptis, ver-'batim inserendæ sunt, viz.' &c. After which followed verbatim the conditions in the original entail. On this deed infeftment was taken on the 13th of August 1792. At this time John M'Culloch the fourth (the appellant) was a minor, and alleged that he knew nothing about, and had not been consulted as to these proceedings. On his father's death he entered into possession under the entail of 1791.

In 1823 the appellant, John M'Culloch the fourth, his three daughters, (his only issue), his sister and brother, brought an action against Sir Alexander Muir M'Kenzie, who had succeeded to his father, for the purpose of reducing the above sale in 1777 and 1783, and recovering the lands. The summons called for production of the whole procedure in the declarator, sale, and ranking, with the titles made up to those

parts of the estate acquired by George Muir, 'with the whole 'grounds and warrants whereupon the same proceeded, made 'and granted or conceived in favour of the said defender, or his 'predecessors or authors, or obtained by him or them, or at his or 'their instance, or to which he or they may have acquired right, 'and by, on, or through which the defender may found any 'claim, right, title, or interest, mediate or immediate, direct or 'indirect, any wise affecting or relative to the lands and other 'subjects before described, and sold in the said process of de-'clarator and sale as aforesaid, or which may any wise affect the 'lands and other subjects which belonged to the said deceased 'John M'Culloch of Barholm, the grandfather of the pursuer; 'to answer at the instance of John M'Culloch, residing at Bar-'holm-house, who is heir of entail of the lands and other subjects 'underwritten, in virtue of a contract entered into betwixt the 'deceased John M'Culloch of Barholm, grandfather of the pur-'suer the said John M'Culloch, on the one part, and Mrs 'Isobel M'Culloch or Gordon, of Culvennan, on the other part, 'dated the 1st and 6th days of March 1751 years; and also in 'virtue of a deed of taillie executed by the said deceased John 'M'Culloch on the 29th day of December 1762 years, and re-'corded in the Register of Taillies on 13th day of January 1763 'years, and who stands duly infeft as heir of entail in the said 'estate of Barholm, conform to charter of resignation and novo-'damus in favour of the now deceased John M'Culloch, last of 'Barholm, the pursuer's father, in liferent, and of the said pur-'suer, his eldest lawful son, in fee, under the seal appointed by 'the treaty of Union to be kept and used in Scotland in place 'of the Great Seal thereof, dated the 13th day of December 1791 'years, and written to the seal, and registered and sealed the '27th day of January 1792 years, and the instrument of sasine 'following upon the charter in favour of the pursuer's said 'father and himself, dated the 13th day of August 1792 years, 'and recorded in the General Register of Sasines, &c. at Edin-'burgh the 1st day of October same year. And also our 'other lovites, (viz. his three daughters, his brother and sister, 'by name), all substitute heirs of entail of the said estate of 'Barholm, with concourse,' &c. Various allegations as to fraud and irregularity in the proceedings were then introduced into the summons, which it is unnecessary to detail, as the question ultimately turned on the title of the pursuers to insist in the action as libelled. It is sufficient to state, that they resolved into charges of a collusive arrangement to defeat the rights of the heirs

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July 28. 1828. of entail under the deed 1762, by rearing up debts which either had no existence, or were not debts entitled to the protection of the statute, and selling, for the benefit of the heir in possession, part of the estates, which might and ought to have been preserved,—of wilful and mala fide neglect of the provisions of the statute, and of legal forms—particularly not calling the proper parties, who were minors. The summons then concluded, that the whole writs and documents should be reduced; 'and being 'so reduced, improven, and set aside, it ought and should be 'found and declared, by decree aforesaid, that the pursuer, the 'said John M'Culloch, has the only good and undoubted right and 'title, not only to the whole of the said lands and others which 'were sold in the said action of declarator and sale, and to which 'the defender now pretends to have right, but also to possess the 'same, and to uplift the rents, maills and duties, profits and 'produce thereof, in terms and under limitations and conditions 'of the said deed of entail in all points, and that the defender 'has no right thereto,' &c. Then there was a conclusion for removing, 'to the effect that the pursuer, the said John M'Culloch, 'and the succeeding heirs of entail, by themselves, their servants, 'cottars, tenants, and others foresaid, may enter thereto, and 'possess, labour, bruik and enjoy the same, and dispose there-'of at pleasure, in so far as is consistent with the said deed of 'taillie, in all time coming.' And farther, that the defender should be ordained 'to discharge and renounce in favour of the 'pursuer, and the other heirs of entail of the foresaid estate of 'Barholm, any pretended right he has to, or grounds of debt and 'diligences against the said subjects, &c. and to deliver up the 'same, and any writs and evidents he has of and concerning the 'said subjects, to the said John M'Culloch, pursuer, as heir of 'entail in possession aforesaid.'

A similar action was raised against other parties who had acquired right to other portions of the estate in the like manner.

Sir Alexander Muir M'Kenzie gave in preliminary defences, which were overruled, under reservation of all objections to the pursuers' title, in so far as they might be blended with, or might arise out of the discussion of the merits of the cause:* And certain procedure took place, which it was alleged, de-

* The Lord Ordinary found Sir Alexander liable in the previous expenses, (except of the summons); but the Court altered, and reserved entire all question of expenses hinc inde till the final issue of the cause. This point was also appealed.

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prived him of the right to an objection which he afterwards stated. That objection was, that as the pursuer, John M'Culloch, founded his title to pursue on the entail of 1791, and the relative sasine in his favour, and insisted for reduction on the ground that the sale had been made in violation of the entail 1762; and as the entail 1791 called the daughter of the pursuer in preference to his brother, contrary to the entail 1762, and, therefore, was in contravention of that entail, the pursuer was not entitled to insist in the reduction. The Lord Ordinary appointed informations to the Court, and their Lordships, on the 17th May 1826, found, 'that the pursuer, John M'Culloch, 'by accepting and making up titles under the procuratory of 'resignation dated the 18th January 1791, which alters the des-'tination and order of succession prescribed by the deed of 'taillie 1762, and therefore imports a contravention of that 'taillie, cannot maintain this action, founded on the provisions 'thereof; and, that the other pursuers cannot insist in the 'conclusions, either reductive or declaratory, of the libel for his 'benefit; and therefore sustained the objection to the title of 'the pursuers, assoilzied the defender, and decerned, with ex-'penses since 8th March 1825.'*

The pursuers appealed.

Appellants.—1. The defence which the Court sustained was raised too late. A defender cannot offer first one and then another dilatory defence, but must make them all at once. But the respondent's dilatory defences had all been already disposed of, and of these the present did not form a part.

2. But the defence has no solid foundation. The appellant, John M'Culloch the fourth, has two distinct and independent titles to pursue:—1. The entail of 1762: Under it an effectual and indefeasible right, a jus crediti, vested in him ipso jure the moment he was born. On this entail the appellant founded: to it he referred for his character of heir of entail; and on it he claimed the right he is vindicating. The summons merely mentioned the charter 1791 and sasine 1792, in order to shew that the appellant is heir of entail at present in possession.† 2. Under the

* See 4. Shaw and Dunlop, No. 377. p. 598.

† In support of this plea, the appellant referred to the instance of the summons, (ante, p. 355.), and to the fourth reason of reduction. 'Quarto, The foresaid deed of 'taillie, granted by the said deceased John M'Culloch, elder, on the 29th day of

July 28. 1828. private statute: It was there enacted, that all the substitute heirs of entail in being at the time should be called as defenders, and if they were not, each heir can insist in a reduction of the sale.

3. But even if the title under the entail 1792 had been different from the title under the entail 1762, that is jus tertii to the respondent. No doubt each substitute heir of entail may protect his right from infringement by the act of the heir in possession; but the substitute heirs need not make the challenge unless they please, and if they do not, no other person can. The cases of Little Gilmour, and Gordon, were marked by the specialty (which does not occur here) that the contravener forfeited for his descendants; and, in pronouncing these judgments, the Court overlooked the judgment in the House of Lords in the case of the Duke of Roxburghe. Even, however, if there had been a contravention pleadable by others than the heirs of entail, it can have no effect until declared by decree of the Court to have been incurred. But there was no contravention. The destination in the title of 1792 corresponded with the destination in the entail 1762. If an heir-male of the body be called, no person can take who is not an heir, a male, and of the body. But the appellant's brother, alléged by the respondent to be preferred by the deed of entail 1762 to the appellant's daughters, although a male, and of the body, is not the heir. The instant the appellant dies, then the heirs-male of the body of John M'Culloch the third are extinct, and the appellant's daughters come in, both as heirs-female of John the third, and of the appellant, John the fourth. The whole tenor of the deed of 1762 demonstrates that this construction is correct. The entailer never could intend to put the institute in a more unfavourable situation than the substitute. At all events, even if there has been a contravention on the part of the appellant, John M'Culloch, there has been none on the part of the other appellants, the next heirs substitute, and therefore they have sufficient title to insist in the action. The title vests in them at their birth, and it is of no consequence whether they be near or remote. It is a mistake to suppose that the other appellants insist for John M'Culloch's

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'December 1762 years, was a valid, complete, and effectual, and also an onerous 'deed, &c.; and also entitles the pursuers, and all other substitute heirs under it, to 'insist for reduction of every thing done, act committed, or deed granted, incon-'sistent, or in any degree at variance, with the said deed of taillie, or in contravention 'or violation thereof; and in particular, the whole foresaid process, sales, and other 'proceedings, and the subsequent conveyances and transmission of the parts of the 'estate of Barholm, sold as aforesaid.'

benefit. It is sufficient that they have an interest, and it is of no consequence that it may first, and for a time, be beneficial to the heir at present in possession. July 29. 1808.

Respondent.—1. There is no foundation for the allegation, that the plea maintained by the respondent is too late. All objections to the title were reserved, and the present one was therefore stated in time. It is indeed not properly a dilatory defence, because it goes directly to the merits; for if the appellant has no title to found on the entail of 1762, then the respondent's right cannot be challenged.

2. The entail of 1762 called the heirs-male of John the third, the institute, in preference to the heirs-female. But the appellant's brothers are the heirs-male of John the third, and must come in before the appellant's daughters. The entail, therefore, of 1792 is a direct contravention of the entail 1762. This contravention is admitted in the very summons raised to protect the provision of the entail 1762, thus confessing the vice in the appellant's title. It is true, that a party having two titles in his person, may possess on both, but only where they are not inconsistent with one another. But here it is declared, that the heir shall possess upon a particular title, and no other; and if, nevertheless, the heir makes up a different title, he cannot ascribe his possession to the entail excluding the other title. Now, the appellants found, as their title, on the entail of 1792, on which they have been infeft, and which is in direct contravention of that of 1762. It is absurd to pretend, that a person cannot hold the character of heir-male without being also heir of line; and therefore, the attempt to shew that there is truly no inconsistency between the titles necessarily fails. But if the deed of 1792 is inconsistent with, and in contravention of the entail of 1762, then the appellant, John M'Culloch, is a contravener, has forfeited his right under the entail, and holds at variance with it all that remains of the estate. He has therefore disclaimed that entail as the estate of his possession. But if so, how can he found on that entail for the purpose of affecting the rights of parties dealing with a former heir? His summons is grounded on the alleged contravention, by his father and grandfather, of the provisions of the entail 1762. But all the appellant's right under that entail is not only forfeited, but abandoned. The cases of Little Gilmour, and Gordon, rule this case. The previous case of Roxburghe proceeded on the supposed impossibility of enforcing a resolutive clause after the death of the contravener. But the appellant is himself the contravener.

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3. The plea of jus tertii does not apply. The respondent is not attempting to lead evidence of contravention to destroy the appellant's title to the estate, but is defending himself from a challenge on an entail which the appellant has disclaimed. If the appellant will enforce fetters, the question necessarily arises, Whether he has a title to found on these fetters or not? The concurrence of the other substitutes does not correct the evil. The contravention by John M'Culloch the fourth is confessed on the face of the summons, and he concludes, that the lands sought to be recovered may be restored to him, *i. e.* to the contravener. The only true result of the concurrence therefore is, that these substitutes having adopted his disclamation of the entail 1762, do not invalidate his title, but destroy their own. It is not necessary to have the irritancy declared by a decree of the Court, for the irritancy is set forth in the summons itself. The appellant may, or may not, be able to purge the irritancy; that, however, is not hujus loci. But independent of these considerations, the appellant, by accepting from his father a procuratory of resignation inconsistent with the entail 1762, and possessing on titles made up on that procuratory, has rendered himself liable for all the debts and obligations of his father, and is thus barred from reducing a sale, which, as his father's representative, he is bound to warrant. If the sales were brought about by the fraudulent contrivance of John the third, he could not have reduced them; and neither can his representative the appellant.

The House of Lords ordered and adjudged, 'that the appeal 'be dismissed, and the interlocutors complained of be affirmed.'

LORD CHANCELLOR.—My Lords, In the case in which M'Culloch is the appellant, and Sir Alexander M'Kenzie the respondent, and which was argued some time ago at your Lordships' Bar, the facts, as far as is necessary to state them to render intelligible the judgment I shall recommend to your Lordships to pronounce, may be stated in a very short compass. A person of the name of John M'Culloch, who, in these papers, is designated as John M'Culloch the second, in the year 1762 made a settlement of the estate of Barholm, in Scotland. By it the estate was limited to himself in liferent, and then to his eldest son, and the heirs-male of his body; whom failing, to the heirs-female of his body; whom failing, to the entailer's second son, and the heirs-male of his body, and so on. That settlement contains all the strict clauses usual in deeds of entail. It provided, 'That it shall not be law-'ful to, nor in the power of the said John M'Culloch, my son, nor any 'of the heirs of taillie,' &c. It farther went on to state, 'That the

'said John M'Culloch, my eldest son, and whole heirs, general or of 'taillie,' &c.; and farther, 'That the person or persons contravening,' &c. So that your Lordships find, that which I have before stated, that all the strict clauses inserted in deeds of this description were introduced into this settlement in the year 1762. July 28. 1826.

In the year 1791 or 1792, John M'Culloch, who is described in these proceedings as John M'Culloch the third, made a new settlement of the greater part of this property. The reason why the settlement did not extend to the whole of the property was, that a part of it had been alienated, to which I shall by and bye refer. In that settlement, John M'Culloch the third settled the property upon himself in liferent, then upon his eldest son, and the heirs-male of his body; whom failing, upon the heirs-female of his body; whom failing, upon his second son, and the heirs-male of his body; whom failing, upon the heirs-female of his body, and so on. My Lords, it is quite obvious, in the first instance, on looking at that settlement, which was made by virtue of a charter of resignation and infeftment thereon, that the provisions of that settlement were completely inconsistent and at variance with the instrument of 1762. By the settlement of the year 1762, the brothers of the present appellant, who was the son of the third John M'Culloch, were to take before any female descendant of the present appellant was to take; whereas by the settlement of the year 1792 it was provided, that the line of female heirs should come in earlier. It is quite plain, therefore, that the terms of the provisions of the settlement of 1792, were directly inconsistent with, and at variance with the terms of the settlement of 1762; and by the terms of the settlement in 1762, any party taking under that settlement, would, by contravening the provisions of that settlement, incur a forfeiture.

In the interval between 1762 and 1792, John M'Culloch the second, and John M'Culloch the third, conferred together for the purpose of disposing of a part of the property: that property was disposed of under the authority of a private Act of Parliament, and under the authority of one of the Courts in Scotland. It is submitted by the present appellant, that that disposition of the property was irregular and improper—irregular in point of form—and improper, in as much as there was fraud, as far as related to the vender, mixed up with it. The property was sold to Mr Muir, the father of the present respondent; but with respect to the merits of that sale and disposition of the property, we have at present no concern. For the question now before your Lordships for your decision, is not as to the merits of that disposition of the property, which will have to be considered, or may be considered in some future proceeding; but the question is, whether, on a title so acquired, the pursuer, who is the present appellant, has a right to proceed in this action?

My Lords,—If we look at the summons and to the nature of the case, the point is substantially this: The party who is the pursuer in the action, is complaining that his father, holding under the deed of taillie of

July 28. 1828. the year 1762, appropriated and improperly disposed of a part of the property; but in setting out the title of the pursuer, although he refers to the deed of 1762, he refers also to the charter of resignation and the new infeftment taken in the year 1792; which new infeftment in its terms and provisions is utterly inconsistent with, and at variance with the terms of the settlement of 1762. How then is it possible for a person, setting out a title under the settlement 1792, which is utterly inconsistent with, and at variance with the settlement of the year 1762, and which is a contravention of the terms and provisions in that settlement, to complain of any thing that was done under the settlement of 1762, by persons claiming under that settlement, and having a title under that settlement?

The answer to this objection, which has been in the first instance stated by the present appellant, is, that the objection came too late; that it was a mere dilatory defence; and being a mere dilatory defence, the party attempting to avail himself of that defence, was out of time. But, my Lords, when we come to look at the nature of the defence, it is not a mere dilatory defence, but, as one of the Judges in the Court below stated, it goes to the merits, as far as relates to the present claim; for the effect and object of it is, the destroying the title under which the appellant comes into Court, to endeavour to recover possession of this property from the respondent. I think it is sufficient to refer to that observation to satisfy your Lordships, that it is not a mere dilatory defence, so as to deprive the defender of the right to avail himself of it.

Another observation was, that there was in fact no difference between the destination of the estate under the settlement of 1762, and the destination of the estate under the settlement 1792. I have already stated to your Lordships what I conceive to be the essential difference between these two settlements,—that the brother is postponed for the purpose of interposing another line of heirs, who would take the estate he would have enjoyed under the settlement of 1762. We heard in the course of the argument a great variety of cases cited; a few from the law of Scotland, but many more from the law of England, said to be well suited to the purpose of shewing that there was in fact no difference between these destinations. I attended to these cases at the time; I have referred to them since; and I think I may say, without speaking disrespectfully of the gentlemen who cited them, that they appear to me to have no bearing upon the present case; and the reference to them has arisen from a misapprehension of the question. I am quite satisfied that the settlement of 1792 is inconsistent with, and directly at variance with the settlement of 1762; and that, my Lords, brings us to the principal question that was intended to be agitated, and the principal question which, in point of fact, was agitated at the Bar in the course of the argument of this case; namely, whether the respondent has a right to avail himself of this defence? The argument at the Bar was this, and it is the argument in the papers

on your Lordships' table, that the respondent is a stranger to these deeds and this settlement; and that, being a stranger to these deeds and this settlement, he has no right to interpose to object; that any person who claims under the original entail may avail himself of these objections, but that a stranger has no right to come in to avail himself of these objections. In fact, that it results to that which is called jus tertii. My Lords, that appears to me a misapprehension of the case; we have only to look at the summons to see that the respondent has a right to avail himself of this objection. He is standing in a Court of Justice as a defender; the plaintiff is seeking to deprive the defender of his property, which his father purchased from one of the ancestors of the present appellant. The defender says, 'before you have a right 'to take from me this property, you must make out your title; you 'must shew by what right and title you claim.' The defender has a right, therefore, to look at the summons, for the purpose of seeing what is the title set out in the summons,—what is the nature of the title on which the pursuer insists; and he finds a title of this description: Reference is made to an entail in the year 1762; the parties holding under that entail sold the property. The complaint is, that that property was improperly disposed of,—improperly sold: the party making the complaint claims the estate, not under the settlement of the year 1762, but under the settlement of the year 1792, a settlement totally at variance in its provisions with the settlement of the year 1762. By the new settlement of the year 1792, he has taken the property in new terms; he has entirely disclaimed the settlement of the year 1762. According to the language of the instrument, he is a contravener of that settlement; he does not hold under that settlement, but holds under the settlement of the year 1792. How can he, then, claiming his title under the settlement of the year 1792, and disclaiming to hold under the instrument of the year 1762, complain of what was done by a party under the settlement of 1762, before his the complainer's title under the settlement of 1792 took its rise? And, my Lords, this is quite clear when you come to look to the terms of the summons. It concludes, 'to deliver up the same,' the land, 'and any writs and evidents 'he has of and concerning the said subjects, to the said John M'Cul-'loch, pursuer, as heir of entail in possession as aforesaid;' that is, which he is in possession of as heir of entail under the settlement of 1792: That is his title; the one made up in the year 1792, and made in contravention of the former settlement; and he claims that the property, in the terms of the summons, may be delivered to him, 'as heir 'of entail in possession as aforesaid,' which is as heir of entail under the deed of 1792, and not as heir of entail under the deed of 1762. It appears to me he can have no right to recover this property.

July 29. 1829.

My Lords,—There were two cases stated at the Bar, one the case of Little Gilmour, and another the case of Gordon of Carleton; one of which was, I think, as far back as the year 1749, and the other in the year 1801; both of which in point of principle, when they come to be

July 28. 1828. considered, apply to and support the judgment in the present case. There were cases cited on the other side, which when they come to be sifted and examined, and minutely investigated, are different in principle, and different in their facts, from that now before your Lordships; and under these circumstances, as far as relates to Mr M'Culloch's title to pursue, I think your Lordships will have no difficulty in concurring in the judgment of the Court below.

But, my Lords, it is said, though Mr M'Culloch himself may have no right to pursue, the other persons who are co-plaintiffs with him have that right, they being substitutes in the entail. But if your Lordships look at the summons, to which they are parties, it appears that they in fact adopt, as far as this cause is concerned, that which is done by Mr M'Culloch. They adopt his disclaimer of the original settlement of the year 1762, and join in that prayer in the summons to which I have directed your Lordships' attention, and (which is material to be considered) that the property may be delivered up to the pursuer as heir of entail in possession under the deed of 1792; and therefore, I apprehend, the Court were perfectly correct in considering that the situation in which these other pursuers stood, did not differ from the situation in which Mr John M'Culloch himself stood. It is on these grounds that I would humbly submit to your Lordships the propriety of affirming the judgment of the Court below. It is proper that I should state to your Lordships, that it was the unanimous judgment of the Court, after much argument and deliberation. It was stated at the Bar, as I observe it was also in the speeches of one of the learned Judges, that a similar case was at the time depending in the other Division of the Court of Session. That, I am informed, has been since decided conformably to the decision of this case.* I think, therefore, that your Lordships will have no difficulty in affirming this decision.

Appellants' Authorities.—4. Erak. 1. 67.; Simpson, Jan. 6. 1697, (15,353.); Irvine, Jan. 1723, (15,369.); Dundas, Nov. 29. 1774, (15,430.); 3. Erak. 8. 32.; Lord Ballenden, Jan. 12. 1698, (7811.); Lord Ballenden, Feb. 3. 1702, (7816.); Duke of Roxburghe, March 5. 1734, (Craigie and Stewart's Ap. Cases, No. 27. p. 126.); Campbell, Feb. 5. 1760, (7783.); Creditors of Cromarty, Feb. 25. 1762, (15,417.) Turner, Nov. 17. 1807, (App. voce Taillie, No. 16.); 2. Erak. 5. 25.; Hamilton, July 23. 1748, (7281.); Ross, Nov. 18. 1766, (7289.); Bargany, March 27. 1739, (Craigie and Stewart's Ap. Cases, vol. i. p. 237., and English Authorities quoted in the papers of that case).

Respondent's Authorities.—Little Gilmour, March 6. 1801, (App. voce Taillie, No. 9.); Gordon of Carleton, Nov. 14. 1749, (15,384.); Cromarty, Feb. 25. 1762, (15,417.).

FRASER—RICHARDSON and CONNELL,—Solicitors.

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* His Lordship was understood to refer to the case of Dickson *v.* Cunninghame, in which all the Judges were consulted, and whose opinions were laid before his Lordship; but the case was not at this time decided, judgment having been delayed till the result of the case of M'Culloch should be learned.—See 7. Shaw and Dunlop, No. 257. p. 503.; 3d March 1829.

COMMERCIAL BANKING COMPANY of SCOTLAND, and Others, Appellants. No. 20.

POLLOCK'S TRUSTEES, &c. Respondents.

Title to Pursue—Process.—An appeal sustained in name of an unincorporated Commercial Banking Company, and several of the individual partners, against a judgment of the Court of Session, in a process in which they were defenders.

July 28. 1828.

2D DIVISION.

THIS was an appeal against several judgments of the Court of Session, in actions raised by the respondents, as trustees of the late John Pollock, against the Commercial Banking Company of Scotland, and several individual partners nominatim. The case came on to be heard on the 28th March 1825; but an objection being taken, on the ground that the Commercial Banking Company was not a corporate body, and yet had been sued by their firm, and not by the names of the individual partners, farther proceedings were adjourned.

The case was afterwards taken up (16th May 1828), and argued on the want of parties.

LORD CHANCELLOR.—My Lords, There is a cause which was heard on a single point before your Lordships, in which the Commercial Banking Company of Scotland, and Archibald Campbell, and other partners of that Company, were appellants, and the trustee and executors of the deceased John Pollock, Esq. manager and permanent director of the Commercial Banking Company of Scotland, were respondents. This case was argued on the single point of the propriety, according to the law of Scotland, of the description of the parties, Whether persons who were united in a trading concern, and describe themselves, for instance, as the Commercial Banking Company of Scotland, can be sued by that title? My Lords, I think, according to the law of Scotland, and according to the practice which has prevailed in that country, the parties appellants are sufficiently described in this case;—it is not merely the Commercial Banking Company of Scotland, but it is the Commercial Banking Company of Scotland, and Archibald Campbell, Esq. and many other persons, by name, who are described as partners in that Bank; and I think where a commercial establishment of that kind exists, it is sufficient, for the purpose of carrying on a suit, to carry it on against the firm, adding to the firm the names of some of the partners in the establishment. This is a still stronger case, because the particular individuals named in this instrument are those individuals of whose conduct the pursuer thinks he has most reason to complain. It is unnecessary to pronounce any opinion in this case as to the result of this judgment. The case

July 28. 1828. must be heard on the other point. The case stood over for your Lordships to consider this point, Whether the cause should go on? If it turned out that the parties were not properly described as defendants, that would have put an end to the cause. If your Lordships concur in the opinion I have expressed, the cause will of course proceed.*

Ordered accordingly.

No. 21.

LEITCH and Others, Appellants.—*Adam—Stuart.*

LEITCH'S Trustees, Respondents.—*Sugden—John Campbell.*

Fee, Conditional or Absolute.—A party having, by his deed of settlement, conveyed his lands to trustees, to hold them in trust for his widow's liferent during her life and viduity; and, on her death or second marriage, for two substitutes successively, and their heirs and assignees in fee; whom failing, another substitute, but without calling his heirs or assigns; whom failing, other substitutes; and the two first substitutes having predeceased the widow, who never married a second time, and the third substitute having executed a general disposition, and also predeceased the widow;—Held, (affirming the judgment of the Court of Session),—1. That the fee had vested in the third substitute; and, 2. That the general disposition was effectual to evacuate the subsequent destinations.

Feb. 17. 1829.

2D DIVISION. Lord Cringletie.

JOHN LEITCH, proprietor of Kilmardinny, was married to Elizabeth Ironside, but had no family. He had a brother George, two nephews, James Frisby Leitch, and Andrew Leitch (the son of George),—two sisters, Christian and Mary,—and two nieces, Agnes and Jean Trokes. In 1804 he executed a mortis causa trust-disposition of his estate in favour of trustees, declaring, 'that these presents are granted, and to be accepted by 'my said trustees, in trust, for the ends, uses, and purposes after 'specified; viz. that they may and shall hold the foresaid lands 'in trust for the behoof of the said Elizabeth Ironside, my wife, 'in case of her surviving me, in liferent, for her liferent alimentary use allenarly, during the time of her life, and of her continuing my widow; and after her death, or in case of her entering into another marriage after my death, then for behoof of 'the said George Leitch, my brother, and his heirs and assignees 'whomsoever, in fee, in case he shall survive me, and shall be in 'life at the time of the death or second marriage of the said 'Elizabeth Ironside; and failing the said George Leitch by decease before me, or prior to the death or second marriage of 'the said Elizabeth Ironside, then I appoint the said trustees to 'hold the foresaid lands and others in trust for behoof of the

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* See post, No. 29.

'said James Frisby Leitch, my nephew, and his heirs and assig- Feb. 17. 1829.
'nees whomsoever, in fee, in case he shall be in life at the time
'of the death or second marriage of the said Elizabeth Ironside;
'and failing the said James Frisby Leitch by decease before me,
'or prior to the death or second marriage of the said Elizabeth
'Ironside, then I appoint the said trustees to hold the foresaid
'lands and others in trust for behoof of Andrew Leitch, my
'nephew, son of the said George Leitch; whom failing, for be-
'hoof of my sisters, Christian and Mary Leitch, and my nieces,
'Agnes and Jean Trokes, equally among them, and their heirs
'and assignees: And I appoint my said trustees, immediately
'after the death or second marriage of the said Elizabeth Iron-
'side, to grant, execute, and deliver a valid, ample, and formal
'disposition of the said lands and others in favour of the said
'George Leitch, and his heirs and assigns whomsoever, in case
'he should survive me, and be living at the time of the death or
'second marriage of the said Elizabeth Ironside: But in case of
'the said George Leitch predeceasing me, or in case of his death
'previous to the death or second marriage of the said Elizabeth
'Ironside, then I appoint the said trustees to grant, execute,
'and deliver a valid, ample, and formal disposition of the fore-
'said lands in favour of the said James Frisby Leitch, and his
'heirs and assignees whomsoever, in case he shall survive me,
'and shall be living at the time of the death or second marriage
'of the said Elizabeth Ironside: But in case of the death of the
'said James Frisby Leitch before me, or before the death or
'second marriage of the said Elizabeth Ironside, then I appoint
'the said trustees to dispone the said lands to and in favour of
'Andrew Leitch, my nephew; whom failing, to my sisters,
'Christian and Mary Leitch, and my nieces, Agnes and Jean
'Trokes, equally among them, and their respective heirs and
'assignees.'

His brother George died a short time afterwards. His nephew, James Frisby Leitch, died in May 1820; and in October of that year, Andrew executed a mortis causa general disposition of all his estates and effects, in favour of the respondents in trust. He died in February 1821, being survived by the widow till November 1823, when she died without having entered into a second marriage. The two sisters and the two nieces, (who were the appellants), survived all these parties.

The respondents, as trustees of Andrew Leitch, having raised an action before the Court of Session against the trustees of John, to denude of the lands of Kilmardinny in their favour,

Feb. 17. 1829. on the footing that the right had vested in Andrew prior to his death; and the sisters and nieces having made a similar claim, the trustees of John brought a process of multiplepoinding. Claims having been lodged, and the processes conjoined, three points were argued:—1. Whether the right of liferent constituted by John Leitch's trust-deed in favour of his widow, was conceived in such a way as to be not merely the primary right conveyed, but suspensive of the existence of any right or interest in the fee in the person of any of the conditional institutes till her death or second marriage took place, whatever might be the difference in the terms of the respective destinations in their favour? 2. Whether the destination in favour of Andrew Leitch was so conceived, as (independently of the supposed difficulty regarding the co-existence of the rights of liferent and fee,) to be dependent on the condition of his surviving the death or second marriage of the widow, in the same way with the previous destinations in favour of the two first conditional institutes, George, and James Frisby Leitch? And, 3. Whether the personal right in the fee, and corresponding jus crediti against John's trustees, (supposing these to have been vested in Andrew Leitch, by his survivance of George and James Frisby Leitch only), were effectually conveyed to Andrew's trustees by the general disposition in their favour?

Lord Cringletie repelled the claim of Andrew's trustees, preferred the sisters and nieces, and assoilzied John's trustees from the action of denuding. His Lordship explained the grounds of his judgment in the subjoined note.*

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* 'The first purpose of the trust granted by the deceased John Leitch was, that his 'trustees should hold his estate for behoof of his wife during her life or widowhood. 'It is in these words. (His Lordship then read the clause, ante, p. 366-7). From 'this it appears to the Lord Ordinary, that John Leitch's primary object was to 'give his widow a liferent of his lands; and the gift of the fee of the subject was of course 'only after her death, or ceasing to be his widow by becoming the wife of another man. 'This must controul the remaining parts of the deed, so as that the fee could not open 'to any one till after her death or second marriage. 2*d*, The trustees are to hold the 'subject for behoof of Andrew Leitch, without mention of his heirs or assignees; whom 'failing, for behoof of the testator's sisters and nieces, the Trokes, equally among them, 'and their heirs and assignees. And as the heirs and assignees of every substitute are 'called, except those of Andrew Leitch, it seems to be quite plain that the testator 'meant to give him the fee of the subject, provided he should be alive at the death of 'Elizabeth Ironside, leaving him to do with it what he pleased; but if he should not 'be alive, or should not dispose of the subject, then it should devolve to Christian and 'Mary Leitch and the Trokes. In short, it appears to the Lord Ordinary to be the 'enixa voluntas of the testator, that if the testator's own brother, and the first substitute, 'and his nephew the second substitute, should not be in life at the death or second mar-

He refused a representation, for reasons which he also stated in a note.* The respondents then reclaimed to the Inner-House, Feb. 17. 1829.

'riage of Elizabeth Ironside, they should not succeed to his estate; and although this 'condition be not repeated in the substitution of Andrew Leitch, yet the fact, that the 'trustees were to hold for behoof of the widow in liferent, and the omission of Andrew's 'heirs and assignees, effects the same object, viz. that if he should not be in life at her 'death or second marriage, the estate was to devolve to the testator's sisters and nieces, 'equally among them. After the destination of succession follows an injunction to the 'trustees to denude, which will be found to be in exact conformity to the preceding 'part; viz. It appoints his trustees, immediately after the death or second marriage of 'Elizabeth Ironside, to denude in favour of George Leitch, and his heirs and assignees 'whatsoever, provided he should be in life at that time; and so on, in conformity to the 'destination of succession. From which it is quite clear, that the denudation was not to 'take place till after the death or second marriage of Elizabeth Ironside; and as the 'trustees were to hold it for behoof of her in liferent, and were called on to denude 'in favour of Andrew Leitch, without mention of his heirs and assignees, such denuda- 'tion could be demanded by himself only, and not by his heirs or assignees after his 'death before that of Elizabeth Ironside. As, therefore, he died before Elizabeth Iron- 'side, the Lord Ordinary thinks that the general disposition by him, even if it had spe- 'cially mentioned this subject, would not have been effectual. But further, the trust- 'disposition founded on does not bear the most distant allusion to this subject. It only 'dispones all and sundry teinds, heritages, houses, tenements, and other hereditaments, 'heritable bonds, adjudications, and sums therein contained, and in general all other 'real or heritable subjects whatsoever, which shall be pertaining and belonging to me 'at the time of my death. The subject in question did not pertain to him at the time 'of his death—it was also under a destination to others, failing him; and it appears to 'the Lord Ordinary, that, according to the rules governing general dispositions, it 'would have been necessary for him specially to mention the subject, in order to eva- 'cuate the destination in John Leitch's settlement. See the case of the Duke of Ha- 'milton and the Honourable Mrs Westenra, then Miss Hamilton, relative to the teinds 'of the parish of Cambusnethan, precisely in point. These teinds were destinated to 'heirs-male; and although they were held in fee-simple by the Duke, and teinds were 'conveyed in general by a general disposition, the general conveyance was not held to 'evacuate the substitution to heirs-male.'

* 'The representer assumes, that after the death of George Leitch and James Frisby 'Leitch, Andrew Leitch was entitled to insist that the trustees should denude in 'his favour; and upon this assumption his whole reasoning is founded, that the trus- 'tees held the subject absolutely and unconditionally for him, whereby he was entitled 'to convey it away. But the assumption is a great mistake. By Mr Leitch's deed, his 'trustees were to hold the subject during Mrs Leitch's life, or until her second mar- 'riage; and it was after her death only, or second marriage, that they were desired to 'denude. Andrew Leitch could not therefore insist that they should denude in his 'favour during Mrs Leitch's life, or until she made a second marriage. They were 'therefore, during Mrs Leitch's life, and widowity to Mr Leitch, to hold the subject; 'and for whom, is just the question. This the Lord Ordinary explained in his former 'Note—viz. For George Leitch and his heirs, provided he survived Mrs Leitch; 2*d*, 'James Frisby Leitch and his heirs, under the same condition; and, 3*d*, For Andrew 'Leitch; and there is no condition of his surviving Mrs Leitch. But the self-same 'effect is produced by leaving out his heirs. The trustees are to hold the subject for 'Andrew Leitch; whom failing, for behoof of my sisters, Christian and Mary Leitch, 'and my nieces, Agnes and Jean Trokes. He never had right to the subject. He

Feb. 17. 1829. when the subjoined opinions were delivered.* The case having

'had a spes successionis only. As soon, therefore, as Andrew Leitch died, during the 'life of Mrs Leitch the trustees held the subject for behoof of these ladies; and after 'Mrs Leitch's death, they alone could call on the trustees to denude in their favour. 'This distinguishes the present case from those quoted by the representer. In the case 'of Gordon, it appears quite clear to the Lord Ordinary that the judgment is right. 'The trustees were bound to denude in Robert Gordon's favour, and must have done 'so if he had required them. They must have been held after that to have been trus-'tees for him, his heirs and assigns, whereby he had a right to convey away the proper-'ty which they held in trust for him. Besides he actually conveyed the very lands, 'and shewed his intention to evacuate the substitution; whereas, in this view, Andrew 'Leitch takes no notice of the subject.'

* *Lord Glenlee.*—I can see but two sentences in the deed. It consists of two parts, and these are just two sentences. Now, in the first part the words are, that the trustees should hold the 'lands in trust for behoof of the said Elizabeth Ironside, my 'wife, in case of her surviving me, in liferent, for her liferent alimentary use allenarly, 'during the time of her life, and of her continuing my widow; and after her death, or 'in case of her entering into another marriage,' then comes in so and so. All is to take place after her death; and it appears to me, that the constitution of the right is not, by the structure of the sentence, to take place till after her death. This is just the thing, the event, upon which it is to take place.

Although we have no idea in our law of a fee being in pendente, yet I do not see why the beneficial interest may not be suspended—why the contingent interest may not depend upon something which may be stated in a deed. Then it goes on, 'for behoof 'of the said George Leitch, my brother, &c.; whom failing, &c. James Frisby Leitch, 'in case he should survive me, and shall be in life at the time.' It was quite an unnecessary and useless repetition to put this in here; because it was clear from the beginning of the sentence that the beneficial interest could not accrue till the death of the said Elizabeth Ironside, or her ceasing to be his widow. Then it comes to Andrew; and here it is quite true that it does not contain the clause 'in case he shall survive,' &c. just because this was perfectly unnecessary; for the constitution of the beneficial interest in favour of Andrew is not to take place till after her death, or second marriage. This is the first sentence. Then it goes on to the second, and provides, 'I provide my 'said trustees to denude,' &c. But this denuding, by the same structure of the sentence, is not to take place till after the death, &c. of the said Elizabeth Ironside. Take the sentence as you will, it is quite clear that no beneficial interest could possibly arise till after the death or second marriage of this lady. It may happen that the widow's right to bygone rents may be in the same situation as if she had been the liferenter, &c. I am therefore clear, that the circumstance, that the beneficial interest did not take place till after the death of the widow, is conclusive of the case.

Lord Pitmilly.—The opinion I have formed on reading these papers, or rather the deed, coincides entirely with that which has been delivered, and on the same grounds as his Lordship has stated. There are, no doubt, words omitted in the conveyance to Andrew, which occur in the other clauses in favour of the prior persons. But when I take the whole deed, or rather the whole clauses of it, I do not think that these words are at all of importance. This is a trust-deed or conveyance of certain lands or subjects to trustees; and the structure of the deed is, 1st, To direct the trustees as to the constitution of a beneficial interest in favour of certain persons there named; and, 2dly, To direct them as to the time when, and the mode in which, they are to denude in favour of these persons. In looking to the deed, your Lordships will find that it begins with a clause by which a liferent right is conveyed in favour of the widow. It then

been continued, and having again come before their Lordships, Feb. 17. 1829.

proceeds to direct the trustees as to the constitution of the beneficial interest. [His Lordship then read this part of the clause.] But the previous part of the clause, which was read by Lord Glenlee, and to which he directed your Lordships' attention, appears to me to apply to all these different cases. It rides over the whole of them, and controuls them. It is only after the death of the said Elizabeth Ironside, or her ceasing to be his widow upon that event, that the subjects are to be held for behoof of George, and failing him, for behoof of James Frisby Leitch, and failing him, for behoof of Andrew. But in all of these provisions, I apprehend, it is only in the event of the death of the widow that they are to convey these properties to the persons named, or to any of them. It appears to me, not merely that it was the intention, but it is expressed in words, that only after the death or second marriage of the widow shall they be held for behoof of any of these persons. Then we have this confirmed, when we come to the other part of the deed which refers to the time when the trustees are to denude; and there the clause begins with words which clearly apply to the whole cases provided for: 'And I appoint my said trustees, immediately after 'the death or second marriage of the said Elizabeth Ironside, to grant, execute, and 'deliver,' &c. They are not entitled to grant a valid, ample, and formal disposition till after the death of the said Elizabeth Ironside. It is only in this event that they can do so. I think, therefore, in both of these important parts of the deed,—the constitution of the beneficial interest, and in the clause directing the trustees to denude,—that it is only after the death or second marriage that this interest can arise. It pervades the whole of the deed, and, as I said before, rides over all the different provisions.

Lord Alloway.—My Lords, I must say that I stand in a very unfortunate predicament, in differing from the opinion which your Lordships have delivered; and considering that we are now reduced to that situation in which your Lordships' judgment is final, and cannot be called in question, I think at least that we should pause before we pronounce judgment; and with all the weight to be given to the opinions which have been expressed—and certainly they are entitled to great weight—yet, my Lords, I consider it my duty, as I have the misfortune to differ from your Lordships, to state the reasons upon which my opinion has been founded. Now, my Lords, I apprehend, that in all cases with regard to the settlement of estates, it is your Lordships' bounden duty to look to the words made use of by the person disposing of his estate. You must look to the words; and I conceive that you cannot apply construction or interpretation to give a different interpretation to those words from that which the words made use of bear. It is a remark of Lord Stair, and one which ought always to be kept in mind, 'that Judges may not arbi-'trarily interpret writs, or give them a sense inconsistent with their clear words.' My Lords, whatever may be my idea of the intention or views of the party, I conceive that I cannot enter into that at all, but that I must look to what are the conditions and the words this man has made use of when he imposed these conditions. I cannot supply one word in addition to what he has used, but must take the words themselves, and give them the effect to which in law they are entitled. Now, my Lords, I beg to call your Lordships' attention to the terms of this deed. It is, I confess, the most singular deed that I ever saw. I agree with my Lord Glenlee, that I never saw the like of it; and if I were to state my conjectures, (which however cannot enter, and I am not entitled to allow to enter, into the view which I entertain of the case), I might say that it must have arisen from the ignorance of the man of business who prepared it. I do not know who he was; but I am sure, that suppose this question were put to any experienced conveyancer—'I wish to convey this liferent to my widow, and the fee to these heirs in their

Feb. 17. 1829. they appointed parties to lodge notes of authorities, and to be

'natural succession;'—for the singular thing is, that he calls the heirs in their natural succession: he first calls George, in the event of his surviving the widow or her marriage, &c.; then he calls James, and then he calls Andrew, and in different terms altogether:—I say, my Lords, if the question had been put to any conveyancer, he would have had no difficulty about the matter. It would have been effectually done by taking the conveyance to be held by the trustees simply for the parties respectively, in liferent and fee. If the deed had been framed in this way, every thing would have been carried into effect with perfect ease. But he has done this in a different way, and we must just look to what he has done. Certainly this is a trust for behoof of the liferenter, in the first place, and then he conveys the fee. But is it not plain that the liferent and the fee are two different things, and may exist in two different persons? Now, what are the words of the destination? There is first the liferent of the widow, and 'then for behoof of the said George Leitch, my brother, and his heirs, &c. in fee;' and here the condition 'in case he shall survive me' is introduced. Failing that event, it is to James Frisby Leitch; and here the condition is also added. Now, suppose that neither one nor other of them had survived the testator, who would have succeeded in the event of their dying before both the testator and the widow? Why, in that case, the testator appoints the trustees to hold the lands for behoof of Andrew Leitch; and there is no condition adjected, as in the other instances, in case he shall survive the widow, &c. The two former are under that condition; but as to Andrew, he is called to the fee without any condition whatever; and if these persons had died before the testator himself, there cannot be a doubt that Andrew was entitled to call upon the trustees to denude in his favour, not the liferent, but the fee; and, my Lords, I apprehend that his creditors could have attached it, and made it responsible for his debts; and you will find a number of decisions where it has been again and again held, that if the personal right vested, it is liable to be attached and made effectual by the creditors of him in whom the right vests. I am clear, that if George and James had died before the testator, he (Andrew) would have succeeded. No doubt, after having gone over the second part of the deed, it proceeds, 'to and in favour of Andrew Leitch, 'my nephew,' &c. They could not convey the fee to the parties first mentioned, while the widow was alive, and remained unmarried: This may be true under the deed; but why withhold the fee from them, if it was intended they should have it? which plainly they could not have, if they died before the death or second marriage of the widow. But no such thing is provided as to Andrew; and, my Lords, this being the case, I must say that I cannot but hold that the fee vested in Andrew. On the second point, it is perhaps not necessary to say any thing; for, my Lords, I think, if the right vested, as it appears to me it did, I hold that it was clearly and effectually transmitted. I think the case of Gordon quite decisive on this point; and, on the whole, I differ from the Lord Ordinary.

Lord Robertson.—My Lords, I coincide entirely with the views and opinions just delivered by Lord Alloway.

Lord Justice-Clerk.—My Lords, I am sorry that on the question of construction we should entertain different opinions. I am now, my Lords, to state to your Lordships the opinion which I have formed, and the grounds upon which I have come to be of that opinion. And, in the *first* place, my Lords, I am clearly of opinion, that if the right vested in this person, he had a clear right to transmit; and it appears he actually did transmit it. I have no doubt about that at all, and I suppose none of your Lordships have any doubt; but I do not think that that is at all the important question which we are called upon to consider. It is the other point which is the most important in the present case. Now, my Lords, I do conceive, that when we come to look narrowly

heard thereon; and after delivering the subjoined opinions, or- Feb. 17. 1829.

at this deed,—when we look at all the provisions which it contains, and take them all together,—and particularly that which I consider to be the most important part of the deed—that part which provides the way and manner in which it is to be carried into effect,—when I look at all these, there appears to me to be no difficulty whatever in the case. I agree entirely with my brother, Lord Alloway, that we are not entitled to go into conjectures and suppositions of what may have been the intention of this party, as, my Lords, I am to take the deed according to its true meaning and import, and give effect to the words which show the will of the maker, so far as I possibly can. Now, my Lords, I think that this must be obvious to every one, that the primary object of the deed was to secure the liferent to this widow during her life, and continuing to be the widow of this man; for, the moment she ceases to be his widow, the whole of it is at an end; but so long as she continues his widow, it is for her benefit. The discontinuance of her widowity, or her death, is that upon which the whole beneficial interest of those called depends; it is only then that the trustees are to hold it for behoof of the persons therein mentioned. It is true, no doubt, that as to two of the individuals mentioned, the maker of the deed has put in a clause, that it is in case they shall be alive at the period of the death, or the widowity ceasing of this lady, that the trustees are to hold for their behoof. This is the clause as to them; and it is true that, as to Andrew Leitch, these words are not mentioned, and do not occur. But the question which we have to consider is, whether there appears in the deed, from the words there made use of, a clear intention that he was to make an alteration in the situation of this person, from what he had provided in the case of George and James Frisby Leitch? And, my Lords, although undoubtedly there does exist the omission I have alluded to, yet I for one am of opinion, that the words omitted are not at all material, when I come to apply the rest of the conditions of this deed. I say, my Lords, when I proceed to the further consideration of the other clauses and conditions, I must fairly confess that it appears to me, that there is not only no indication of a purpose in reference to Andrew, contrary to what is provided in the case of the others; but there are words used, which, I think, admit of no other construction or interpretation, except that the conditions precedent, as to the trustees holding for behoof of George and James Frisby Leitch, were also to be applied to Andrew and the nieces. The words of importance, as it appears to me, are, 'And I appoint my said trustees, immediately after the death or second marriage of the said Elizabeth Ironside, to grant, execute, and deliver a valid, ample, and formal disposition of the said lands and others in favour of the said George Leitch, and his heirs and assignees whatsoever, in case he shall survive me, and shall be living at the time of the death or second marriage of the said Elizabeth Ironside.' Then it proceeds in similar terms in the case of James Frisby Leitch, and goes on,—'But in case of the death of the said James Frisby Leitch before me, or before the death or second marriage of the said Elizabeth Ironside, then I appoint the said trustees to dispone the said lands to and in favour of Andrew Leitch, my nephew; whom failing,' &c. Now, my Lords, what I beg of your Lordships to attend to is this, that the death of the widow on the one hand, or ceasing to be in a state of widowity on the other, is the condition precedent to the conveyance in favour of George Leitch, and also of James Frisby Leitch. She must be dead, or must have ceased to be the widow of this man, before either of these can take place. This is perfectly clear; and if so, how can your Lordships put on that which is so emphatically coupled, a construction which, it is perfectly clear, will be in direct contradiction to the condition there expressed?—Your Lordships see, that, all along, the death or widowity ceasing is a pre-existing condition, and expressly stated to be so by the testator; and, having done so, he makes use of the emphatic word 'then,' showing clearly that it is

Feb. 17. 1829. dered Cases.* Thereafter, on advising the Cases, the Court (2d June 1826) altered the interlocutor; preferred the respondents; decerned in the action against John's trustees; and repelled the claim of the appellants.†

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only on that precedent condition of the death, &c. of the widow, that the trustees are to make any disposition at all. This, my Lords, I apprehend to be perfectly manifest; and how, then, is it possible to make a different application as to Andrew? And when he just adds these words, that they shall execute and deliver valid dispositions, &c. I hold it to be clear, nay, the entire voluntas of this man, and expressed in words which are just as clear as they can be, that it was only after the death of this lady, or her ceasing to be his widow, that any beneficial interest could ever arise. That is the way I conceive we are to construe the clause; and with respect to the words in regard to George and James, in case they shall survive me and be in life, &c. these it appears to me to be quite unnecessary and superfluous; for I am not entitled to stop there—I must read on, and I find the words are connected by the word *then*. In my opinion, it is declared in the clearest manner, that no denuding whatever was to take place in favour of either of these parties mentioned in this deed, unless they survived the widow, or her discontinuing to be the widow of this person; and as Andrew did not survive, I am decidedly of opinion that the interlocutor of the Lord Ordinary is quite well-founded; and I beg to be distinctly understood as giving my opinion on the words of this deed as used by the testator, and not as proceeding on conjecture as to what may have been his intention. I proceed upon the words themselves, which seem to me perfectly explicit.

* *Lord Robertson.*—The widow had a liferent for her liferent-alimentary use allenarly, and the trustees were to hold the estate for her behoof during the time of her life, and of her continuing a widow. At the same time they held it for behoof of George Leitch in fee; only, it is added, 'in case he shall survive me, and shall be in life at the time 'of the death or second marriage of the said Elisabeth Ironside.' George's right therefore depended on his surviving the widow, or her entering into another marriage. The same is the condition of the right of James Frisby Leitch; and both of these predeceased the widow. Who, then, is called in the third place? It is Andrew Leitch; but there is no such condition in his right as was attached to the case of George and James; and though he also predeceased, yet his right being unconditional, the trustees held the fee for him; and he had a good personal right, though not formally vested.

Lord Glenlee.—The fee was in the trustees from the beginning. It is only in the event of the widow's death, or second marriage, that any other person has any right. There is no fee in any of the persons named, their right being altogether contingent. In ordinary trust-deeds there is an interest in somebody, but here there is none.

Lord Pitmilly.—I wish to hear something further on this case, as I must confess I have in a great degree altered my opinion since the case was formerly before us.

† *Lord Glenlee* still maintained, that the fee did not exist in the parties named till the death of the liferentrix.

Lord Pitmilly.—This trust-deed is drawn in rather an unusual style, and there are some expressions in it which lead to considerable doubt; and therefore I do not wonder that a difference of opinion should exist. When this case was formerly before us, I concurred in the opinion which has now been expressed by Lord Glenlee. But I now confess, that, after giving all the attention in my power to this case, I have come to a different conclusion.

There can be no doubt, in the *first* place, that all that was given to the widow was a liferent right. Of this there can be no doubt. She could have no claim beyond the

The sisters and nieces then appealed. Feb. 17. 1829.

Appellants.—1. By the terms of the trust-disposition of John Leitch, the trustees were to hold the lands until after the de-

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liferent. It is equally clear that the trust-deed granted the right of fee to certain of the relations of the truster, in the order in which they are mentioned in the trust-deed, although this right of fee could not be exercised till the death of the liferenter. Yet it is contrary to all principle to say, that this right of fee could not exist at the same time with the liferent. I think that both existed together. They were separate and independent estates:—the one was the liferent belonging to the widow; the other was the fee which was granted to certain relations of the truster, and which must have existed in some party during the whole time the liferent existed, although it could not be exercised during that time.

It is said, that the fee was vested in the trustees, and that the relations had nothing more than a mere spes successionis. I do confess that this appears to me to be mere words, which do not solve the question. There is no doubt the trustees were feudally vested in the estate; but then it was in trust, both for the liferenter and the fiars. The trustees can no more be said to be the fiars, than they can be said to be the liferenters. The fee was, from the beginning, in one or other of the parties named; it could not be otherwise. It was not in the liferenter; neither was it in the trustees, except merely in trust for some of the parties.

The question then is, Who was this fiar? The whole argument of the parties depends on the words in the clause: 'And after her death, or in case of her entering into another 'marriage after my death, then for behoof of the said George Leitch, my brother, and his 'heirs and assignees in fee,' &c. This is the whole case. It depends on these words, 'after her death.' It is said, that in consequence of these words no fee began till after the death of the liferentrix. But I apprehend that the purpose of the clause was merely declaring that none of the fiars should exercise the right during the subsistence of the liferent. It was only after the death of the widow that the beneficial interest in the fee was to commence; but the fee existed at a much earlier period. Accordingly, much stronger words than these have had the same interpretation given to them. Thus, in the case of Wellwood, the words there were,—'Failing of me by decease, to Mr Robert Wellwood, 'advocate, my nephew, and the heirs-male of his body; whom failing, to Robert Wellwood, 'my brother-german,' &c.; which words were considered as merely having the effect of preventing the fiar from exercising the right of fee during the subsistence of the liferent. [His Lordship then alluded to the opinion given in that case by Lord Justice-Clerk Braxfield.] The case of Crawford appears to me very important. There also was a trust-deed there; and that deed, as in the present, declared, 'but upon her death, or second 'marriage, if she survive me, or at my death, if I survive her,' &c. The construction that was put upon the words of that deed was, that the fiars should not have any beneficial interest till after the death of the liferenter. I cannot possibly get over the marked distinction between the provisions in favour of George and James, and those in favour of Andrew. These are totally different. The words in favour of George are, 'in case 'he shall survive me,' &c. They are the same with regard to James Frisby. But when you come to Andrew, there is no such restriction; the words 'in case he shall survive 'me,' &c. are altogether omitted. I do not know what right the party has to say that these words are to go for nothing. Why were they inserted with regard to George and James, and omitted with regard to Andrew? What explanation can be given of the clause? How are we entitled to say that the one is exactly the same as the other? that the provisions in favour of George have just the same meaning as those in favour of Andrew? I am not prepared to go into that. It appears to me that these are very important words; and when I see them omitted in the case of Andrew, I must hold

Feb. 17. 1829. cease or second marriage of the widow. Until that period, no absolute indefeasible right vested in either George, James, or

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that there is something different in the two cases. Take the case of George Leitch, and suppose that the words to which I have alluded had been omitted with regard to him,—can it be seriously maintained that George would not have been fiar from the beginning? I think he would have been the fiar, at the same time the widow was liferenter, although he would not have had the beneficial interest till the death of the liferenter. Andrew is just in that situation. He is the fiar, according to the fair construction of the deed, from the commencement. I cannot put a different construction upon it, after giving it all the attention in my power. The case of Crawford is a very express authority. You have a full account of that case in these papers. You have there almost the identical words that you have in this case. The fact there was, that he executed a conveyance of his right during the life of the widow, and effect was given to that conveyance; holding clearly, therefore, that he was the fiar—that the fee was in him—and that he was entitled to make it over to his creditors. It is true that the creditors could not enter into the beneficial use of the conveyance during the life of the liferenter, and could not get possession till the death of the widow. But still, notwithstanding the widow was in existence when it was granted, the deed was sustained. Therefore, although this is a question of difficulty, yet, after giving it all the consideration in my power, I am clearly of opinion that the fee of this property was in Andrew Leitch.

Lord Robertson.—I am entirely of the same opinion with Lord Pitmilly.

Lord Alloway.—When I first gave my opinion in this case, I was almost single, and therefore went into the particulars at some length; but now it is different, and I am unwilling to detain your Lordships. Lord Pitmilly has in great measure stated the grounds of my opinion; and notwithstanding the different opinions which I have heard, and the well-drawn papers on both sides which I have read, I continue of the same opinion as before. The case for Andrew's trustees is remarkably well stated, and lays down precisely the grounds of my opinion. There seems to have been a great blunder in the view taken of this case in the Outer House, where the rights of liferent and fee are quite confounded, though they are separate and distinct. There cannot be a liferent without a fee. It may be fiduciary; but still it is held, not for the trustee, but for the party who has the right of the fee; and it is the same as if it were directly vested in that party. It is ingeniously argued by the defenders, that it was the intention of the deed to give no right of fee during the life of the widow; but this is contrary to the words of the deed itself, and inconsistent with what was found in the case of Crawford. [His Lordship here read the words of the trust-deed in the case of Crawford.] The words in that and in the present case are the same. I cannot, for my life, see the smallest difference. Indeed there was one difference, that the person having the right as fiar in the case of Crawford, granted the conveyance of his right, not only during the lifetime of the widow, but nearly twenty years before he was entitled to compel the trustees to denude in terms of the trust-deed. It is of no consequence whether the fiar survived the liferenter or not. [His Lordship mentioned the case of Mirrlees against Mathie, 17th May 1826; 4. Shaw and Dunlop, p. 591. decided by the Court in the same way.] In the present case there were three parties in the destination. As to the two first, viz. George and James, there is a suspensive condition. [His Lordship read the words.] Still the widow had nothing more than a liferent, nor could she claim more. As to the third party, viz. Andrew Leitch, there is no condition; and I wish to know upon what ground this Court, or any Court, can insert such a condition. [His Lordship read the words.] There is no grammatical construction which can authorize carrying the condition from one clause to another. Suppose it were a question of presumption, I cannot conjecture what could be the reason of making such a distinc-

Andrew. Therefore, Andrew could not, during the life or vi- Feb. 17. 1829.
duity of the widow, have required the trustees to denude of the

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tion, if it was not the intention to give Andrew a preferable right. But there are many reasons for supposing this to be the testator's intention, though intention does not affect my opinion. Andrew was his eldest brother's son, and the persons after him are strangers and half-blood relations. It cannot be presumed that he meant to favour strangers before his heir-at-law. I deny that presumptions can apply here against the words, or that it is in the power of the Court to adopt them. The words of Lord Stair, as to the interpretation of writs, are quite correct: 'That Judges may not arbitrarily interpret writs, or give them a sense inconsistent with their clear words.' If constructions were allowed, every man would construe deeds according to his own interest. The case of Tennant, and the later case of Richardson, show that both your Lordships and the House of Lords have found that you cannot go upon intention against words. The appointment to denude is still stronger than the destination. [His Lordship read the words appointing the trustees to denude in the two first destinations, as contrasted with the appointment in the third destination.] I ask if these words are to have no meaning? In the third destination there is no condition, which could never happen by chance. None of the Court entertained any doubt upon the other points which are argued in the papers, and therefore I need say nothing upon them. In every such case you must give effect to the right, as at the time when it is constituted by the deed. In the case for the defenders it is asked, 'Could Andrew Leitch's creditors have adjudged his right?' I answer decidedly that they could. The puzzle which is attempted on this point, is no puzzle at all. I am quite clear that Andrew Leitch had the power of conveying his right; and his creditors might have adjudged it, as they could any other right which belonged to him.

Lord Justice-Clerk.—I do not consider myself as precluded by what passed on a former occasion. The Court have not yet given any judgment. We first ordered notes of authorities, and then Cases; but none of us is fettered by what was then done. Notwithstanding all I have heard, I am of opinion that the interlocutor ought to be adhered to. I was one of those who gave an opinion in the case of Richardson; but I consider myself free to give my opinion now on the deed which is before me. The first question is, 'Whether, by the construction of the deed, Andrew Leitch was entitled to demand a conveyance of the fee?' I think he was not entitled. In construing this deed, you must judge of the whole deed at once. You are not to conjecture what he ought to have done, but what he has done. As to the question, what was reasonable and proper, we have nothing to do with that; nor will any authority beat me out of my opinion. The deed is of a very peculiar nature. The plain meaning is, that the trustees are vested in the whole subject, and are to hold it for behoof of the widow during her lifetime, and continuing unmarried. [His Lordship read the words.] George Leitch must be alive after the widow; the same is the case as to James; and though, in the third case of Andrew, the words are omitted, which can neither be denied, nor can your Lordships supply the omission, yet it appears to me, that on a fair, grammatical, reasonable, and legal construction, you are not to stop at the death of James, but you must go on to the death of the widow. The other clauses show that the testator had in view that the trustees should hold the property during the whole time of the widow's life. The word 'then' applies to her death, or ceasing to be a widow. [His Lordship read the clause.] This is to be taken in close connexion with the preceding parts of the deed, where it is clear that no disposition was to be granted during the lifetime of the widow. This is putting a fair and rational construction upon the deed, which I consider it incumbent on every Judge to do. The phraseology as to Andrew is confined in extent; but the

Feb. 17. 1829. fee in his favour. No doubt, in the substitution to Andrew, the words 'in case he shall be in life,' &c. are omitted; but they were unnecessary, since 'his heirs and assignees' are not called; there are no words of inheritance used. The meaning of the testator was, that the trustees should, after the death or on the second marriage of the widow, inquire which of George, James, and Andrew, was alive, and denude to that survivor. Suppose that Andrew, outliving the testator, had predeceased George and James, dying before the widow, it could not be maintained that the fee had vested in Andrew. The beneficial interests of all the parties remained suspended, until the death or second marriage of the widow; and the fee being thus eventual,—to begin to exist after the liferent ceased,—and Andrew having died before that period, the trustees held for the next substitutes, the appellants.

2. Andrew's general conveyance, not referring specifically to the lands of Kilmardinny, cannot exclude the subsequent substitutes in John's disposition of that estate.

Respondents.—1. It is undoubted law, that a right of fee may coexist with the right of liferent. In the present case, the right of liferent was merely coexistent with the conditional right of fee in the two persons first called, and in the unconditional right of fee in Andrew Leitch, next called, and not suspensive. To say that the trustees were the fiduciary fiars, does not advance the appellants' case; for still the question remains, for whom were the trustees fiduciary fiars? In relation to this point it will be observed, that no condition of survivance of the widow, or of her second marriage, is annexed to the fee conveyed to Andrew through the trustees; and these words are not supplied by the want of words of inheritance. Such words were not necessary to enable Andrew to direct the destination of the fee, or to vest

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words do not give him any right till the death of the widow. I like better to take the deed as it is, than to go into other considerations. In the cases which have been brought forward, I do not find any thing to warrant our putting a different construction from what I have put upon this deed. I do not care for the case of Crawford. The question there was between an assignee and an adjudger. There were not two sequestrations and adjudications. I can extract nothing from it applicable to this case. Different opinions may be entertained at different times. It is said that great doubts have been entertained of the decision in the case of Duntreath. This case must be decided upon the deed itself. The right of Andrew Leitch depended upon his surviving the widow. As Andrew was not in a situation to convey, it is needless to consider any other point of the cause. 4. Shaw & Dunlop, No. 405. p. 659.—N. B. The clause is there inaccurately quoted.

in others his *jus crediti* to require the trustees to denude. The clause applicable to Andrew being distinct and explicit, cannot be controlled by mere inference of intention deduced from other parts of the deed. If he survived George and James, the fee vested in him whether he survived or predeceased the widow and her second marriage. Their predecease was the only condition on which the vesting of the right in Andrew depended; and as they did predecease him, the clause must be read as if that condition were expunged. Feb. 17. 1829.

2. The disposition executed by him was sufficient to transfer his right to the respondents, and includes the sisters and nieces as substitutes.

The House of Lords ordered and adjudged, that the interlocutor complained of be affirmed.

Lord Chancellor.—There was a case argued at your Lordships' Bar, depending upon the construction of a deed executed in the year 1804 by Mr John Leitch. When the case was argued, I stated to your Lordships what was the impression upon my mind at the conclusion of that argument; but in consequence of what was stated respecting the learned Judges in the Court below having felt it to be a question of considerable difficulty, I was desirous of looking into the papers before I finally pronounced my opinion upon the case. Upon looking into the papers, I am confirmed in my original impression, and I am satisfied, according to the construction of that trust, that Mr Andrew Leitch had a vested interest during the lifetime of the widow. I think it is impossible to put a reasonably different construction upon that instrument, without inserting in the instrument words which I don't find in it; and I think there is nothing in this case that can justify your Lordships in inserting such words. I put this construction, therefore, upon the instrument upon principle, upon my notion of the free and proper construction of that instrument, and also upon the authority of the case of Crawford, which was cited at the Bar, and which appears to me on principle to govern the present case. There were two other points made in the course of the arguments, and in the papers. One was as to whether it was competent to Andrew Leitch to dispose of this property during the lifetime of the widow; and if it were so competent to him, in the next place, whether the disposition he made of it was a valid and substantial disposition? Upon these points no doubt was entertained by the Judges in the Court below. Indeed they are too clear for argument. I am satisfied, in the first place, that Andrew Leitch did make a disposition of the property; and I am satisfied that the property passed by the instrument by which he disposed of it. Under these circumstances, I shall recommend to your Lordships that the judgment of the Court below be affirmed.

Feb. 17. 1829.

Appellants' Authorities.—(1.) Duncan, June 27. 1809, (F. C.); Omey, Nov. 19. 1788, (6340.); M'Culloch, December 18. 1760, (6349.); Henry, Feb. 19. 1824, (2. Shaw and Dunlop, No. 668. p. 725.)—(2.) Farquharson, March 2. 1756, (2290.); Duke of Hamilton v. Westenra, (not reported).

Respondents' Authorities.—(1.) Kames's Law Tracts, No. 4. p. 145.; Trustees of Wellwood, Feb. 24. 1791, (Bell's Reports, and 15,463.); M'Dowal and Selkrig v. Crawford, Feb. 6. 1824, (2. Shaw and Dunlop, No. 640. p. 662.); 4. Stair, 42. 21.; Erak. 1. 50.; Baillie, June 17. 1766, (14,941.); Campbell, Nov. 28. 1770, (14,949.); Murray, June 22. 1774, (14,952.); Hay, July 24. 1788, (3215.); Dykes, June 3. 1813, and Note, (F. C.); Richardson, July 5. 1821; affirmed, April 8. 1824, (1. Shaw and Dunlop, No. 131. p. 185. and 2. Shaw's Ap. Cases.)—(2.) Gordon's Trustees, Dec. 4. 1821, (1. Shaw and Dunlop, No. 221. p. 185.); Laing Weir, Dec. 6. 1821, (1. Shaw and Dunlop, No. 226. p. 192.); 3. Erak. 6. 20.; Weir v. Drummond, Nov. 28. 1752, (4314.); Robson, Feb. 18. 1794, (14,958.); Drummond, July 17. 1782, (2313.)

J. FRASER—RICHARDSON and CONNELL,—Solicitors.

No. 22.

WILLIAM SPENCE, Appellant.

ALEXANDER ROSS, Respondent.—*Lushington—Ivory.*

Locus Pœnitentiæ—Absolute or Revocable—Fiar.—A father having, by missive letter, sold a piece of land, taking the purchaser bound to grant a bond in favour of himself in liferent, for his liferent use allenarly, and of his sons nominatim in fee; and having caused his sons to sign a postscript to the missive, agreeing to allow the money to lie in the purchaser's hands for eight years certain;—Held, (affirming the judgment of the Court of Session), in a question between the father and the creditors of the sons, that although no bond had been delivered, and no disposition prepared, the fee had irrevocably vested in the sons.

March 25. 1829.

2D DIVISION. Lord Mackenzie.

WILLIAM SPENCE, the appellant, was proprietor of a piece of ground near Musselburgh. He had two sons, William and George. On the 18th October 1814 he agreed to sell the property to Sir John Hope of Pinkie, by the following missive:—'I agree 'to sell you the ground near Musselburgh belonging to me, and 'presently occupied by Government as barracks, for the price of 'L. 2000 sterling; your entry to be Martinmas old style; from 'which term the price is to bear interest. The said sum of L. 2000 'is to be declared by the disposition a burden on the subject, and to 'remain in your hands at interest, on a bond granted to me in life-'rent, for my liferent use allenarly, and to my sons William and 'George, equally between them, and their heirs, in fee, the interest 'being payable to me during my life, and, after my death, the same 'to be payable to my sons, equally between them, for two years 'thereafter; and the principal to be paid them at the elapse of 'two years after my decease. You are to rest satisfied with the

'titles that they are good, and to be at the mutual expense of con- March 25. 1829.
'veying it over to you.' Sir John having stated his wish that Spence's two sons should consent that the sum should lie for at least eight years certain in his hands, Spence wrote, and the sons signed, a postscript to the missive, in these terms:—'We, William and George Spence, sons of the foresaid William Spence, 'proprietor of the barrack ground, hereby agree, that the above 'sum shall remain in Sir John Hope's hands at least for eight 'years certain after Martinmas first, 1814.' Thereupon Sir John accepted the offer, on condition of his 'agent being satisfied 'with the regularity and goodness of your titles.' A disposition in favour of Sir John was then executed by the appellant, and a bond in terms of the missive was granted by Sir John; but neither the disposition nor the bond was ever delivered. Sir John in virtue of the missive entered into possession, and thenceforth paid the interest to the appellant as it fell due.

William Spence, the eldest son, died in 1819, unmarried and intestate; and his brother George having thereafter become bankrupt, a sequestration followed, and Ross was appointed trustee.

Ross advertised the bond for sale, as being the property of George, subject to the liferent of the appellant. Of this the appellant brought a suspension and interdict, in which he maintained, 1*st*, That as neither the disposition nor the bond had been delivered, he was not divested of the property, and therefore was entitled to the price; and, 2*d*, That the transaction being in relation to the sons mortis causa and gratuitous, he was entitled to resile quoad them. To this it was answered, 1*st*, That although there had been no actual delivery, yet the transaction was rei interventu so complete, that the appellant could not resile, and could be compelled by legal process to give the disposition on receiving the bond in terms of the missive; and, 2*d*, That the fee was expressly vested in the sons, delivery made to them, and an act of ownership exercised by them, with the consent and full knowledge of the appellant. The Lord Ordinary repelled the reasons of suspension, with expenses; adding in a note, 'The Lord Ordinary considers the communication to 'the sons as of the strongest kind; for it not only made them ac- 'quainted with the conveyance in favour of the father in liferent 'allenarly and of them in fee, but it required an actual and pre- 'sent exercise by them of the right vested in them under that 'conveyance, which exercise did take place accordingly. This 'seems far stronger than putting a conveyance on record.' Spence having reclaimed, the Court, after ordering a note of

March 25. 1829. authorities to be lodged, adhered on the 17th November 1826, but found no expenses due to either party.*

William Spence *appealed;* but having died, the House of Lords, on petition, ordered (8th July 1828) that the case should stand revived in the name of his disponee, William Spence, a minor, and his curator, John Horatio Savigny.

Appellant.—The original appellant was absolute fiar, and could dispose of his property as he chose. By his missive, he merely intended to supersede the necessity of a family settlement, which would have been, as far as destination was in question, revocable at pleasure. This transaction was no doubt onerous with Sir John Hope; but it was purely gratuitous as to the sons. It never was made real, but remained personal. Neither the bond nor the disposition has been delivered; and the records are silent as to both. In dubio, a father is never presumed to part with his property to his children; and here the missive merely imports the indication of an intention to transfer a real right to the sons; but which intention has not been carried into execution. The real right remained with the father. He and Sir John Hope could have departed from the bargain, and cancelled the whole transaction. The sons had merely a spes successionis. The postscript signed by them merely shews, that they were acquainted with the views their father entertained as to the distribution of his estate; but that did not alter the right inherent in the father, nor divest him of it. Besides, that missive cannot be regarded in any other light than a mortis causa deed, which is revocable if not delivered or recorded. To listen to the respondent's claim, would be visiting the father with the most grievous hardship. He never contemplated placing these lands out of his controul, or that the fruit of his industry should be carried away by his son's creditors.

Respondent.—The father, by his own deliberate act, restricted his interest in the lands to a mere liferent, and conferred on his sons the character of fiars. The transaction is complete and indefeasible. The missive has been delivered to a third party to hold for the sons' behoof; and that delivery is equivalent to recording. The missive was thus put beyond the father's controul. Sir John was vested with the absolute right of

* 5. Shaw and Dunlop, No. 9. p. 17.

holding the price during the father's lifetime, for the sons in fee. March 25. 1829.
The father clearly could not have called up the principal, or compelled Sir John to alter the destination. In a question with the father, the personal right conveyed to Sir John was effectual, and could be made as feudally complete, as if from the beginning a disposition had been granted, with infeftment and registration. Sir John could, by legal measures, have forced delivery of the disposition, as the sons could of the bond. But, truly, the executing the bond or disposition has no bearing or relevancy on the present question. The delivery of the missive is per se sufficient. It is, therefore, a fallacy to pretend, that, because the right is still personal, the interest, which was passed to the sons, could be now varied either by the father alone, or in conjunction with Sir John. Besides, the sons were made parties to the transaction, and their actual and present exercise of ownership required and interposed. It is irrelevant to say the missive was quoad the sons purely gratuitous; that does not make them less creditors, if the deed constituting the gratuitous right has been delivered. Then the jus crediti is as indefeasibly vested, as if the most onerous consideration had been given. It is also irrelevant to maintain that there has been no registration; for independent of the knowledge which the sons had of the missive, and the actual delivery of it to Sir John, the sons were subscribing parties to the arrangement, a specialty which would have made non-delivery of the mere missive of very little consequence. In short, the father chose to abandon his character of fiar, and gave it unqualifiedly, except as far as it was burdened with the liferent, to the sons; and it is obviously impossible, merely because the surviving son has become bankrupt, to recall that character, in order to disappoint his son's creditors. The argument rested on the nature of mortis causa deeds has no place here. The present is entirely different from a testamentary writing. The trustee never intended to disturb the father in the enjoyment of his liferent; and beyond that he has no interest.

The House of Lords ordered and adjudged, that the interlocutors complained of be affirmed.

Appellant's Authorities.—3. Ersk. 8. 35. and 3. 5. 3.; Baird, Jan. 4. 1774, (7737); Hill, July 2. 1755, (11,580.); Monimusk, Feb. 21. 1628, (11,566.); Inglis, Nov. 14. 1676, (11,567.); Simpson, Nov. 16. 1697, (11,570.); Holwell, May 31. 1796, (11,583.); Somerville, May 18. 1819, (F. C.); Miller, July 11. 1826, (4. Shaw and Dunlop, 499. p. 822.)

Respondent's Authorities.—Leckie, Nov. 22. 1776, (No. 1. Ap. Presump.); Turner, Jan. 23. 1783, (11,582.); Fairlie, June 11. 1630, (11,567.); Trotters, Nov. 20.

March 25. 1829.

1667, (11,498.); Borthwick, Jan. 20. 1686, (7735.); Sinclair, June 26. 1707, (11,572.); Hamilton, Jan. 9. 1741, (11,576.); 1. Stair, 10. 5. and 7. 14.; 3. Ersk. 2. 43.; Riddell, Jan. 3. 1750, (11,577.)

J. & A. SMITH—RICHARDSON and CONNELL,—Solicitors.

No. 23. COLIN CAMPBELL, Appellant.—*Pollock—T. H. Miller.*

ALEXANDER ANDERSON, Respondent.—*Adam—Wilson.*

Mandate—Res noviter.—1. Held, (affirming the judgment of the Court of Session), that a mandatary or factor of a person abroad, is entitled to act in that character, until he receive authentic intelligence of the death of his constituent. 2. Circumstances under which a proof of facts alleged to be res noviter refused.

May 1. 1829.

1ST DIVISION. Lord Medwyn.

ANDERSON was factor for Gordon of Draikies, a landed estate in Inverness-shire. Campbells, Fraser and Company, of Glasgow, were the commercial agents of Gordon in relation to his West Indian possessions. Gordon having occasion to visit his West Indian estates, granted to Anderson, on the 19th September 1808, a factory, inter alia giving extensive powers for the management of Draikies, 'and if he shall judge it for my interest, to borrow such sum or sums of money as he may think proper 'on my account, to the extent of L. 5000;' and for that purpose to grant and subscribe bonds, &c.; 'and likewise to draw bills 'and other drafts in my name, and on my account, on such 'commercial houses as I have, or hereafter may happen to have 'dealings with; and generally, all and sundry other things to 'do in my affairs, which I could do if personally present, or 'which any factor might do in like cases.'

A copy of this factory was sent to Campbells, Fraser and Company, and they agreed to advance what money Anderson might require during Gordon's absence.—Gordon sailed in November; and thereafter various pecuniary transactions took place between them and Anderson.

In the course of their correspondence, Anderson, on the 15th March 1809, wrote to Campbells, Fraser and Company:—'I 'had a letter from Mr Gordon yesterday by the Marywell of 'Liverpool, acquainting me that he had arrived (at Berbice) in 'good health;' and on the 30th of March he wrote to Colin Campbell the acting partner:—'I had a letter from Mr Gordon, 'dated 27th January, when his health continued better than 'when he left home.'

On the 28th October 1809 Anderson wrote to Campbell, May 1. 1823.
that, as Gordon's 'purposes here would require an accommoda-
'tion of L. 500, I have advised him of my intention of soliciting
'your house to this extent; and if you will permit me to draw
'on you at three months for the same, be so good as acquaint
'him therewith, per the Harmony, that he may have the earliest
'knowledge of this addition to his engagements with you, and
'provide accordingly.' Campbell answered, (4th Nov. 1809),
'Your draft on Campbells, Fraser and Company, will meet
'honour to the extent you mention; and should remittances not
'be received, and that they require it, you can reimburse them in
'some shape until the crop comes round.' Accordingly Ander-
son, 'per procuration of Robert Gordon,' (11th Nov. 1809),
drew on Campbells, Fraser and Company, for L. 500, at three
months' date, in favour of John Fraser, agent, at Inverness,
for behoof of the Bank of Scotland, and discounted the bill at
Fraser's office. Of the same date, he intimated the draft to
Campbells, Fraser and Company; and wrote to Campbell,
'Agreeable to your permission, I have this day drawn upon
'your house, as advised, per L. 500, at three months' date, to
'complete Mr Gordon's arrangements at this term; and by the
'time it falls due, I trust you will be in possession of funds to
'meet it, or that it can be otherwise provided for should you
'find it necessary.'

On the 22d November Anderson wrote to Campbell, 'Toge-
'ther with your favour of the 18th current I have just received
'a letter from Mr Lewis Cameron of Berbice, dated 27th
'August, communicating the death of our worthy friend Mr
'Gordon on the 25th of same month,—an event as distressing as
'it was unexpected. About a month ago a report of this cir-
'cumstance was circulated here; but as it came from no autho-
'rity, and similar groundless stories had been handed about on
'former occasions, his friends experienced no uneasiness, parti-
'cularly as the Hawk, that sailed from Demerara on the 14th
'September, and arrived in the Clyde on the 23d October,
'brought no such intelligence.' In answer Campbell (30th
November 1809) mentioned the heavy balance due to his house
by Gordon, and stated, 'that the draft you lately drew for
'L. 500 is also unaccepted, as until something is arranged I
'could not ask Campbells, Fraser and Company to do the
'needful; but I have no doubt whatever of my concern doing
'this the moment they learn the views of the executors.' The
result however was, that Campbells, Fraser and Company, re-

May 1. 1829. fused to accept the bill; and in reference to this Campbell wrote to Anderson, 'I authorized the drawing of that bill; but it was 'under the condition that you was to provide for its payment 'when due, should no remittances be received from Demerara. 'From the unexpected change of circumstances, considered you 'were prevented fulfilling your part of that understanding, 'therefore I do not think it could be expected that Campbells, 'Fraser and Company, were to come under the engagement, 'until they were informed more particularly of the situation of 'Mr Gordon's affairs.' But no objection was raised on the communication made in Anderson's letter of the 23d of November.

Campbells, Fraser and Company, having been compelled by an action to pay the bill, with expenses, to the holder,* and having received the bill, and assigned their claim to their partner Campbell, he raised an action against Anderson, concluding for reduction of the bill, for repetition of the amount, and relief of the expenses in the primary action. The ground of action was, that Anderson was informed, and in the knowledge of Gordon's death, before he drew the bill; that his powers as factor necessarily ceased from the time of his constituent's death, and that he had therefore no power to draw the bill as factor per procuration of Gordon, whether he had been previously in the knowledge of Gordon's death or not; and that, at all events, his letters imported an individual liability. To this it was answered, 1. That as the bill was in the hands of the pursuer, and was the document which formed the foundation of his claim of relief, a reduction was an improper process; but, 2. That as the defender acted on the bona fide belief that Gordon was alive when he drew the bill, and as it was drawn expressly factorio nomine, the defender could not be rendered personally liable.

The Lord Ordinary repelled the reasons of reduction, and assoilzied the defender with expenses; and issued the subjoined note.† To this judgment the Court, on the 7th December 1826,

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* See 2. Shaw and Dunlop, No. 330. p. 346.

† 'The form of reduction adopted here does not seem accurately calculated for 'the grounds of the action. The bill sought to be reduced is not in the defender's 'hands, but in the pursuer's, nor does he found any action upon it against the pursuer; 'and if it be null, this defence ought to have been pleaded in the action where the 'pursuer was found liable to pay the amount to the holder of it. Moreover, after the 'reason of reduction founded on the clause of style, the two next may afford grounds 'for relief, but not for reduction of the bill, which is the only writ called for. The 'fourth reason is the only proper ground of reduction, that the bill is null, as having

adhered.*

May 1. 1829.

Campbell appealed.†

'been drawn subsequent to the death of the mandant. But as this event was not 'known at the time in this country, the defender's having continued to act on his 'factory was legal, and therefore the bill cannot be set aside on that ground.

'If it be competent, under this summons, to consider whether the pursuer has any 'claim of relief against the defender, it appears to the Lord Ordinary to be quite clear, 'that the defender neither meant to undertake any personal responsibility, nor did 'the pursuer understand that he did. The pursuer was the chief partner in the house 'of Campbells, Fraser and Company, who were the consignees of the late Mr Gor-'don of Draikies, for his West India estates. The defender, as factor on the estate of 'Draikies, was authorised by the pursuer to draw upon his house on behalf of Mr 'Gordon. He accordingly asked leave (28th October 1809) to draw for L.500; and 'if this was permitted, he begged the pursuer to write Mr Gordon, that he may have 'the earliest knowledge of this addition to his engagements with you, and provide ac-'cordingly. The pursuer, on 4th November 1809, says, "Your draft on Campbells, 'Fraser and Company, will meet honour to the extent you mention; and should remit-'tances not be received, and that they require it, you can reimburse them in some shape, 'until the crop comes round." The defender accordingly draws the bill under reduc-'tion for L.500, "per procuration of Robert Gordon;" and besides notifying officially 'to the house, he notifies also privately to the pursuer, and adds, "By the time it falls 'due, I trust you will be in possession of produce to meet it, or that it can be otherwise 'provided for, should you find it necessary." Before the bill was presented for accept-'ance, the accounts of the death of Mr Gordon reached this country, when the em-'barrassment of his affairs became known, and Campbells, Fraser and Company, 'refused to accept the bill, being then, as they state, in advance about L.5000 for Mr 'Gordon. The Court, at the instance of the holder of the bill, found them liable in 'terms of the permission to draw in the letter of 4th November 1809, and the pursuer 'has been compelled to pay.

'Now it appears, that in the whole transaction the defender was acting, and was 'known to be acting, as the factor of Mr Gordon, and for his behoof. The reimburse-'ment was to come from the crop in the West Indies, all of which was consigned to 'Campbells and Company; and the utmost that the defender was asked to do was, if 'remittances did not arrive, and if Gordon's agents required it, he, as Gordon's factor, 'should reimburse them till the crop came round; that is, provide some temporary 'accommodation, by discount or otherwise, if they really required it, till the crop 'arrived from which both parties contemplated that it was ultimately to be paid. In 'the correspondence subsequently, (see letter 10th February, and 29th March 1810), 'any thing like a personal responsibility by the defender is not pleaded. They refused, 'however, to accept, or to take charge of this bill; they never, therefore, did, or could 'call upon the defender to provide for it till the crop came round. Further, it would 'appear that they actually received the crop as consignees; for it is admitted by them, 'that their debt, stated to have amounted to L.5000, has been paid off; and if, by pay-'ing this bill at the time, they had put themselves into a condition to claim reimburse-'ment for it, they would probably have been successful to this further extent also. 'But when they did not do so, it appears to the Lord Ordinary that they cannot claim 'relief from the defender personally.'

* 5. Shaw and Dunlop, No. 58.

† *Res Noviter.*—When this case came on for hearing, Campbell prayed the House to allow him to present a petition relative to certain facts alleged to be important to the

May 1. 1829.

Appellant.—1. The correspondence shews, that if funds of Gordon did not come forward to sufficient amount to meet the bill, Anderson was to supply them himself. He not only acted as Gordon's factor, but interposed his own personal credit; to both his characters, as factor and individually, the appellant and his house looked for relief. 2. Before the bill was drawn Gordon was dead, and the defender's power abated. The mandate had expired. 3. Although the respondent, before he drew the bill, knew that reports of Gordon's death were in circulation, yet he in pessima fide withheld the intelligence from the appellant's house.

Respondent.—1. The correspondence clearly establishes that the respondent merely acted as factor, and that the appellant and his house regarded the respondent as such. 2. Death does not extinguish a mandate from the date of the death; and what the mandatary does ignorantia facti, is as valid and obligatory as if the mandant still lived. 3. The respondent

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question at issue; and which facts, he averred, had come to his knowledge subsequently to the removal of the record from the Court of Session by the petition of appeal. The House gave the permission prayed for, on condition that he should in the meantime pay the costs decerned for by the Court of Session, and of the day's appearance.

Campbell accordingly petitioned the House, stating, that since the record of the case had been removed from Scotland by the appeal, he had ascertained, that at the time Anderson applied for accommodation, he was in the knowledge of Gordon's death; that had the record still remained in Scotland, the appellant would have been allowed to prove the facts as being res noviter: 4. Stair, I. 44.; Grahame, May 29. 1821, (1. Shaw and Dunlop, No. 39.); M'Whirter, February 14. 1822, (1. Shaw and Dunlop, No. 360.); 6. Geo. IV. c. 120. § 10.; and concluding, that he was entitled still to lead the proof (suo periculo) of his allegation in point of fact; and therefore praying the House to remit to the Court of Session, with instructions to allow a proof of the new facts which he alleged to be material to the question at issue.

To this Anderson answered, that this application was unprecedented;—that the supposed fact, if true, occurred more than twenty years ago,—had not been averred during the protracted litigation which followed,—and had not been stated until two years after the Court of Session's final judgment. No intimation is given of the nature of the evidence to be adduced, or of the names of the witnesses to be cited, nor the circumstances which so long kept the fact unknown.—The Court of Session always regards allegations of res noviter with great jealousy and reluctance. They insist on being satisfied that the fact bears closely on the question at issue,—that it has been recently discovered,—and that there is good reason why it was not discovered sooner. Dundas, March 1810, (F. C.); Magistrates of Dumbarton, November 18. 1813, (F. C.) The appellant must therefore either proceed with his case, or withdraw his appeal entirely; and if the prayer of the petition be granted, it should only be so on payment of the whole costs incurred in the appeal.

The House refused the prayer of the petition.

did not know of the death of Gordon when the bill was drawn, nor had reasonable ground to suspect that such an event had occurred. No person believed the reports which prevailed, as described in the letter of the 22d November 1809; and the respondent was justified in disbelieving them. The appellant's arguments, if good for any thing, would have saved him from the decree in Fraser's action. May 1. 1829.

The House of Lords ordered and adjudged, that the interlocutors complained of be affirmed, with L. 50 costs.

LORD CHANCELLOR.—There can be no doubt what is the law of Scotland on the present point. The case resolves into a question of bona fides. The Court below seem to have been of opinion that there was bona fides on the part of Anderson; and I see no ground for drawing a different conclusion. I therefore move your Lordships to affirm the judgments complained of, with L. 50 costs.

Appellant's Authorities.—Ayton, March 2. 1769, as reversed in House of Lords, (14,573.)

Respondent's Authorities.—3. Ersk. Inst. 3. 41.; 1. Bell's Com. p. 395. and authorities there cited.

M'DOUGALLS and CALLENDER—FRASER,—Solicitors.

ARCH. M'PHAIL, (a Pauper), Appellant.—*Murray—Heath.* No. 24.

WILLIAM GLENNIE, (a Pauper), Respondent.—*Wilson.*

Implied Obligation—Mutual Contract.—Held, (affirming the judgment of the Court of Session), that a road-contractor is liable for the wages of workmen hired by a person acting ostensibly as the overseer of the contractor, but who, it was alleged, was a sub-contractor,—there being no satisfactory evidence that he was known in this character to the workmen.

GLENNIE raised an action before the Court of Session against the appellant M'Phail and Robert Cooper, alleging, that in 1820 M'Phail had contracted to form and make a road from New Pitsligo to Banff; that he had employed Cooper as his overseer or foreman; and that Cooper had hired him (Glennie) to work on the road, which he had done, and for which there remained due to him a balance of wages, for payment of which he concluded. In defence, M'Phail admitted that he was the principal contractor, but alleged, that Cooper had entered into a subcontract with him for executing a part of the road, and that May 11. 1829.

1ST DIVISION. Lords Alloway and Eldin.

May 11. 1829. Glennie had been hired by Cooper on his own behalf, and not for M'Phail. In support of the alleged sub-contract M'Phail produced missives between him and Cooper, bearing date the 18th October 1820; but Glennie asserted, that these had been concocted subsequent to the bankruptcy of Cooper. He denied that Cooper was a sub-contractor, or, (if he was so), that this had been made known to him or the workmen; and he maintained, that having expended his labour on the road contracted for by M'Phail, he was entitled to payment from him of his wages, unless M'Phail could establish his allegation, that the pursuer had been hired by Cooper as sub-contractor. The parties having agreed to a remit to a judicial referee, to ascertain the facts on which they were at issue, the referee took evidence, and reported, 'that there was no sub-contract between 'M'Phail and Cooper known in the country, till the road was 'finished and Cooper had become insolvent; and that M'Phail 'had acted so as to induce a belief that he was in partnership 'with Cooper.' This report was afterwards superseded on alleged irregularities;* but the parties were held concluded on the proof taken by the referee. On advising it, the Lord Ordinary decerned in terms of the libel; and the Court, on the 16th June 1826, adhered.

Lord Balgray.—I take this to be a very plain case, and free from any difficulty whatever. It is just one of the common cases where a party contracts to finish a road in a certain way, and employs workmen to do the work under him. No doubt, it is a very common practice for the contractor, who is responsible for the due execution of the work, to enter into a sub-contract with some other person; and in questions between the contractor and the sub-contractor, regard must always be had to the terms and understanding on which they acted.

The case, however, is very different, when you come to consider the situation in which the workmen are placed who are employed to do the work; and I think, wherever there is a sub-contract, it should be distinctly explained to them what is the nature of the transaction between the other parties. It is said here, that there was a sub-contract; and a missive is referred to as proving this. Now, I don't say that this is to be thrown out of view in a question between M'Phail and Cooper. In arranging between themselves, this may be all very well, and Cooper may be bound to relieve M'Phail; but when you consider the

* See 3. Shaw and Dunlop, No. 388. p. 574.

situation of the workmen, it appears to me that you must have evidence that this sub-contract was known to them to exist, and its nature explained to, and understood by them. Now, I can find no such evidence here. There have been a great number of witnesses examined on both sides, but I don't think they prove this knowledge. Indeed it is quite evident, that there was no such sub-contract as is now alleged; at least it is manifest that it was not known to exist. May 11. 1822.

Lord Craigie.—I view the case in a different light:—It appears to me that the difference between a sub-contractor and an overseer is very evident; and it is a difference much better understood and known by the labourers employed, than by us. I have no doubt about that at all. It may be quite true, that the precise terms of the contract were not settled between the contractor and the sub-contractor; but it is as clear as daylight, that Cooper contracted with the defender M'Phail, not to be an overseer, but as a sub-contractor; that the parties did contract from the beginning and throughout in these characters; that there was a bargain from the beginning, of the nature of a sub-contract, imperfect as it was, between these parties; and that Cooper did not stand in the situation of an overseer, but of a sub-contractor. As to these poor people not knowing of this,—they may be ignorant of many things; but as to their ignorance of the difference between an overseer and a sub-contractor, I really cannot suppose it possible;—they are good judges of what concerns their own interest. I think it is very plainly made out, that they did know of the sub-contract, and therefore I am for altering the interlocutor.

Lord Gillies.—I confess that I am extremely puzzled with this case. I conceive that these two parties did enter into an agreement, by which the one was to give up a part of the contract to the other. I think that is quite plain; but, at the same time, I am quite satisfied that these missives are ex post facto operations. But although there may be, and I think was, an agreement between the two, the question just comes to be, Whether these poor men were aware of it, and relied for payment of their wages on Cooper alone, or on both him and M'Phail? And from the evidence I think they did not look to Cooper alone; I see nothing to prove that they did not consider both liable. Therefore I think the interlocutor right.

Lord President.—I am of the same opinion; and just on the grounds stated by Lord Gillies. In short, whatever might be the private agreement between the two, I think they are both liable.

May 11. 1829. M'Phail appealed.

Appellant.—The summons is rested on the ground that Cooper was the appellant's overseer, and as such employed the respondent. But it is proved that Cooper was a sub-contractor; and as it is admitted that the respondent contracted with him, and not with the appellant, he cannot make any claim against the appellant.

Respondent.—It is proved that the appellant was the contractor for the road, and that the respondent was hired to work on that road; it is therefore irrelevant to say that Cooper was a sub-contractor, unless the knowledge of that fact be traced to the respondent. But this has not been done. On the contrary, it has been proved, that all the workmen regarded him as the appellant's overseer, acting for his behoof; and that, till Cooper became bankrupt, the alleged sub-contract was kept latent.

The House of Lords ordered, that the interlocutors complained of be affirmed.

SPOTTISWOODE and ROBERTSON—MONCREIFF, WEBSTER and THOMSON,—Solicitors.

No. 25. ARCHIBALD SPEIRS, and Others, Appellants and Respondents.

HOUSTON'S Executors, and OLIVER VILE, Houston's Assignee, Respondents and Appellants.

Cautioner—Indefinite Payment.—Where parties bound themselves to guarantee S. F. and Co. in reimbursement of all bills drawn by A. on, and accepted by them, for four years, and to see S. F. and Co. provided with funds to relieve these acceptances, before the acceptances fell due; and S. F. and Co. opened an account with A., debiting him with these acceptances, and crediting him with bills remitted by him; and at the end of the first year, S. F. and Co. desired him to draw in future on a Banking house, (of which the partners of S. F. and Co. were, with others, members), and the bills were accepted by the Bank; but no notice of this was given to the sureties; and before the lapse of the four years A. became bankrupt, indebted in a balance to S. F. and Co.;—Held, 1. (affirming the judgment of the Court of Session), That the sureties were not liable for the bills drawn on, and accepted by the Bank; and were therefore liberated from their obligation at the end of the first year; and, 2. (reversing the judgment), That although there was at the end of the first year a large balance on the account-current against A., yet as, by subsequent remittances made by him, it was extinguished, and the ultimate balance arose out of posterior transactions, the sureties were not liable for that ultimate balance.

May 22. 1829.

2D DIVISION. Late Lord Meadowbank, and Lord Pitmilly.

WALTER LOGAN, Robert Baird, and others, were partners of the Banton Coal Company, carrying on business near Glasgow, under the firm of H. and R. Baird. In October 1808, Logan, on behalf of the Company, applied to the Honourable Simon Fraser and Company, of London, (composed of the Honourable Simon Fraser and James Henry Houston), for a cash credit, which, after some correspondence, they agreed to give, on the following letter of guarantee, dated in January 1809, being granted by the appellants:—'We request you will accept the 'drafts which Mr Walter Logan, or any other persons by his ap- 'pointment in writing, may draw on you from time to time, on 'account of H. and R. Baird, founders at the Canal Basin, near 'Glasgow; and we hereby, jointly and severally, agree to guaran- 'tee your reimbursement, together with all damages or contin- 'gencies that may occur to you from the engagements you may 'thereby come under, to the extent of L. 7000, for the period of 'one-year from the 31st December 1808, when the amount of 'your outstanding acceptances, not remitted for, is to be reduced 'to L. 6000; and thenceforth the sum to be annually reduced 'L. 2000, until the whole be liquidated, which will be at the end 'of the year 1812; until which time, subject to the said annual re- 'duction, this guarantee is to remain in full force: And we further 'undertake, that the amount of your engagements from time to 'time, shall be always provided for by remittances in undoubtedly 'good bills on bankers, or other equally good houses in London, 'not having more than 65 days to run; such remittances to come 'to hand at least six days before your acceptances, for which 'they are intended to provide, shall fall due. We are, &c. '(Signed) Archibald Speirs, James Baird, Peter Murdoch, 'James Laird, James Alexander, James Hill.'

Logan immediately began to operate on the cash credit, by drawing bills at three months on Fraser and Company, which they accepted; and he provided for them, by remitting bills in favour of Fraser and Company, agreeably to the letter of guarantee. In the current account opened by Fraser and Company, they debited H. and R. Baird with the respective acceptances, and gave credit for the bills remitted.

On the 28th of December 1809 Fraser and Company wrote the following letter to Logan:—'We have the pleasure to in- 'form you, that we have established a banking concern in this 'city, which will open on the first proximo, under the firm of 'the Honourable Simon Fraser, Perring, Godfrey, Shaw, Barber 'and Company. The Company consists also of our J. H. Hous-

May 22. 1829. 'ton; and the principal reason why his name does not appear in 'the firm, is to preserve a more marked distinction between our 'banking concern and our commercial one, the firm of which, 'from and after the 31st of this month, will be "The Honourable 'Simon Fraser, Houston and Company."'—'We are induced, 'by motives of personal convenience, to request that you will 'have the goodness henceforward to draw on, and make your 'engagements payable with the new firm, stating in the body 'of the bill, value in account with Fraser, Houston and Com-'pany, or of F. H. and Co. will do equally well; and for this 'purpose we use the freedom to send some fresh bill stamps, 'and have filled up, for your government, a blank one in the 'way we mean. Your letters and remittances you will have 'the goodness to address to us as heretofore, with the dif-'ference only of the introduction into our firm of the name of 'our Mr H. Arrangements have been made by us to prevent 'the possibility of the least interruption or mistake arising out 'of the change; besides which, our Mr H. will take a principal 'share in the management of the new concern. We hope, there-'fore, that 'this arrangement will not prove otherwise than 'agreeable to your good self.'

Accordingly, from and after the 31st December 1809, Fraser and Company carried on business under the new name of the Honourable Simon Fraser, Houston and Company, but without any change in the partners; and the banking establishment commenced under the firm mentioned in the letter. No notice of this change was communicated to the sureties. From this period Logan ceased to draw on Fraser and Company, (or Fraser, Houston and Company), but drew on the Banking Company, the drafts bearing to be 'for value in account, as advised, with Fraser, Hous-'ton and Company;' and these were accepted by the Banking Company. All his remittances were made directly to and in favour of Fraser, Houston and Company.

At the above date, (31st December 1809), Fraser and Company were under acceptances to Logan for L. 7130, which were payable in January, February, and March 1810, and stood at the debit of H. and R. Baird. Remittances to that amount were made by Logan to Fraser, Houston and Company, before the acceptances fell due, and were put to the credit of H. and R. Baird, in the account current. The transactions were carried on in the same way till February 1811, when H. and R. Baird became bankrupt.

At this period Mr Fraser died, leaving Mr Houston the sole surviving partner of Fraser, Houston and Company. In this character he raised an action, in 1812, against H. and R. Baird, and the appellants, as sureties under the above letter, claiming a balance of L.5739. 11s. 7d., due on the cash-account from the 31st December 1808 till April 1811, when it was closed. In defence the appellants maintained, 1*st*, That the conclusion of the libel was not warranted by the letter of guarantee on which it was founded, in as much as the letter, which was not transferable to other parties than those in whose favour it was granted, bound the appellants to guarantee Mr Logan's drafts on the Honourable Simon Fraser and Company alone, while the balance claimed arose upon drafts, not on Simon Fraser and Company, but on the banking-house, and in account, not with Simon Fraser and Company, but with Simon Fraser, Houston and Company. 2*d*, That even if the letter of guarantee had been applicable to the drafts and advances made subsequently to the 31st of December 1809, yet its terms and conditions had not been attended to, in so far as it provided for the gradual reduction and liquidation of the advance; and that the claim fell to be reduced to the amount of L. 4000, as in December 1810. And, 3*d*, That the balance due on the 31st December 1809 had been extinguished by subsequent remittances. The Lord Ordinary, (the late Lord Meadowbank), on 12th November 1813, observing 'that there is no difficulty as to the 'facts of the cause, or in the statement of accounts, which seem 'to call for further investigation, or for remit to an account- 'tant; and being of opinion that the drafts of Walter Logan, 'in the year 1809, on Fraser and Company, for behoof of H. and 'R. Baird, are paid and extinguished by remittances from that 'gentleman, and cannot now become a ground of action to 'Fraser and Company against that gentleman, the Banton Coal 'Company, or the defenders the guarantees; and being also of 'opinion that the drafts of Walter Logan, accepted by Fraser, 'Perring, Godfrey, Shaw, Barber and Company, though au- 'thorized by Fraser and Company, or the Honourable Simon 'Fraser, and James Henry Houston, Esq. the sole partners of 'that Company, or of its successors, Fraser, Houston and Com- 'pany, were not so conceived as to be entitled to the benefit of 'the obligation of guarantee granted by the defenders, without 'at least notice of the change of firm thereby adopted being 'given to the defenders, so that they might have had an oppor-

May 22. 1822.

May 22. 1829. 'tunity of acquiescing therein, or objecting thereto;'—sustained the defences, but found no expenses due.*

Thereafter, the case having come before Lord Pitmilly, he refused, on the 15th November 1816, and 25th June 1817, two representations by the pursuer. To these judgments, the Court, on 10th December 1818, adhered. In the meanwhile Mr Houston died, and his executors, being sisted in his place as pursuers, again reclaimed, and, *inter alia*, contended, that the remittances made posterior to the 31st December 1809 could not be held as applicable to the balance due as of that date, but that the account must, in a question with the sureties, who alleged that the obligation then terminated, be held as closed on the 31st December 1809, and therefore, as the balance then due exceeded the sum sued for, they were liable in terms of the libel.

The Court (4th March 1820) found, that 'the drafts of Walter Logan, for behoof of H. and R. Baird, upon and accepted by Fraser, Perring, Godfrey, Shaw, Barber and Company, though authorized by Fraser and Company, or the Honourable Simon Fraser, and James Henry Houston, Esq. the sole partners of that company, or of its successors, Fraser, Houston and Company, are not to be held as entitled to the benefit of the obligation of guarantee granted by the defenders to the pursuers, and in so far sustained the defences, and adhered to the interlocutors complained of; but, before answer in regard to the question, Whether the drafts of Walter Logan, for behoof of H. and R. Baird, or the Honourable Simon Fraser and

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* His Lordship added in a note,—'This case is certainly difficult; and, of course, my opinion will bend to authority or practice of merchants, if quoted to me. I should not have much regarded the mere change of firm of 'Fraser and Company,' or if 'Fraser, Houston and Company,' had proceeded to receive and accept Walter Logan's drafts, and referred the parties to get payment at Fraser, Perring, Godfrey, Shaw, Barber and Company. This was merely equivalent to giving an order on their own bankers. But the guarantees, by the conception of the obligation, rely on the acceptances of Fraser and Company, not of any bankers Fraser and Company might employ; and though the acceptances of the bankers might be better, it is not clear that the holders of the acceptances would be entitled to the benefit of Fraser and Houston's warranty, though the bankers themselves had a right to it; and, even if the holders were so entitled, they must have had recourse to an action at law for the purpose, since Fraser, Houston and Company, did not appear as obligants on the face of the document. So that there was a great and essential change produced by the new measure on the security in contemplation under the obligation of guarantee, and therefore intimation and approbation seem to me to be required. It need not be added, that the defenders might have had private reasons for not dealing with the house of Fraser, Perring, Godfrey, Shaw, Barber and Company, however unexceptionable their security, or superior to that of Fraser and Company.'

'Company, are to be held as having been paid and extinguished 'by remittances from Walter Logan, for behoof of H. and R. 'Baird?'—remitted to an accountant to consider and report his opinion on the state of accounting between the parties, and the question reserved.* The accountant (Mr Scott Moncreiff) reported, that, on the 31st December 1809, a balance had arisen against H. and R. Baird of L.7130, but that remittances had subsequently been made; and therefore, 'in proceeding to the 'consideration of the question still at issue between the parties, 'it appears to the accountant to resolve into the two following 'subjects of inquiry; viz. May 22. 1829.

'1. Whether there is any evidence, that it was the understanding of Simon Fraser and Company and Mr Logan, that the 'remittances by the latter were to be applied specifically to the 'discharge of such of his drafts as were about to fall due, in terms 'of the stipulation contained in the letter of guarantee?

'2. If there was no such understanding, Whether the balance 'due by H. and R. Baird on 31st December 1809, must be held 'to have been extinguished by the first remittances made in 1810? 'or whether Fraser, Houston and Company, were entitled, as 'creditors, to apply these remittances, in the first place, to the 'unguaranteed debt contracted after 31st December 1809, so as 'to leave the balance at that date still undischarged?

'With regard to the first of these questions, the accountant 'humbly reports, that Mr Logan, in his letters to S. Fraser and 'Company, and Fraser, Houston and Company, desired the remittances he enclosed to be placed to the credit, and the drafts 'he advised to have made, to be placed to the debit of H. and R. 'Baird; and the accountant has not observed, in any of these 'letters, any special appropriation of the remittances to particular 'drafts, either past due, or about to become due. By the letter 'of guarantee, the defenders became bound that S. Fraser and 'Company should be possessed, six days before their acceptances 'fell due, of remittances having not more than sixty-five days to 'run; but this does not seem to have been attended to by Mr 'Logan, whose remittances had frequently more than sixty-five 'days to run after they reached London; and S. Fraser and 'Company's acceptances sometimes fell due before they received 'remittances to provide for them.

'The accountant therefore submits, that there was no understanding between the parties, binding the house in London to

* See Houston v. Speirs and others, March 4. 1820; Fac. Coll.

May 22. 1829. 'apply the remittances they received from Mr Logan to the dis-
'charge of specific drafts, but that the remittances were made,
'generally and indefinitely, to account of H. and R. Baird.

'On the second point, regarding the right claimed by the pur-
'suers, of applying the remittances made by Mr Logan, in the be-
'ginning of 1810, to the acceptances granted at that period, and
'not to the balance of the former year, it is with deference that
'the accountant submits his opinion, that, as the Court have
'found that the defenders are not liable for Mr Logan's drafts
'on the banking-house, because they were not made in terms of
'the letter of guarantee, they are not entitled to derive benefit
'from remittances made to a different firm from that to which
'this letter of guarantee is addressed; and but for which remit-
'tances, it is not probable that the new firm would have author-
'ized the banking-house to accept Mr Logan's drafts. The ac-
'countant is aware, that although there was an alteration in the
'firm of the house of the Honourable Simon Fraser and Com-
'pany, yet there was none in the number or names of the part-
'ners; but he humbly conceives that this alteration in the firm is
'as much in favour of the pursuers, as the alteration in the mode
'of drawing has been found in favour of the defenders, whose let-
'ter of guarantee was addressed to the Honourable Simon Fra-
'ser and Company, and not to Messrs Fraser, Houston and Com-
'pany, to the latter of whom the remittances were made at the
'same time that they were advised of drafts having been made on
'their banking-house. If, however, their Lordships shall think
'that the alteration of the firm does not avail the pursuers, be-
'cause that firm consisted of the individuals of the former firm, the
'accountant humbly submits his opinion, that the case will fall
'to be determined in favour of the defenders, as, in that case,
'the balance claimed by the pursuers will consist of drafts on
'the banking-house not remitted for by Mr Logan.'

On advising this report, with objections, &c. the Court found, (20th November 1823),* 'that there was no specific appropria-
'tion of the remittances made by Walter Logan after the change
'of the firm from Simon Fraser and Company to that of Fraser,
'Houston and Company, in January 1810, to the drafts which
'had been drawn by him on the old firm prior to that period;
'and that the defenders are not entitled to derive benefit from
'the remittances made to the new firm, except in so far as these

* 3. Shaw and Dunlop, No. 126. p. 160.

'remittances, when compared at any one period of the account May 22. 1829.
'with the drafts drawn by Logan on the banking-house of
'Fraser, Perring and Company, had the effect of reducing the
'balance below the amount for which the defenders were bound
'as the account stood in the end of December 1809; and of new
'remitted to the accountant to make up a state, shewing the
'exact balance due by the defenders according to the finding.'

The accountant reported,—'According to the principles by
'which the Court has fixed that the accounting in this case
'is to be regulated, the remittances made by Mr Logan, be-
'gun in January 1810, fall to be applied, in the first instance,
'to the drafts drawn in terms of that arrangement, which
'have been found not to fall under the guarantee, and the
'surplus only, if any, falls to be applied to the reduction
'of the old balance at 31st December 1809, covered by the
'guarantee. But it sometimes happened, that Fraser, Houston
'and Company, received advice from Mr Logan of his having
'drawn on the banking-house before the bill was actually pre-
'sented for acceptance, and, consequently, entered in the account,
'and at the same time received a remittance from him; and the
'question therefore arises, whether, in applying such remittance
'to the drafts on the banking-house, Fraser, Houston and Com-
'pany, were entitled to take into account the draft of which they
'had received advice, though it was not yet presented for accept-
'ance? This question is of considerable importance in the case,
'as will be apparent by referring to a single example. By
'letter of 20th January 1810, Mr Logan remitted to the new
'firm bills to the amount of L. 916. 15s. 8d., and advised them
'at the same time of his having drawn on the banking-house for
'L. 1000. The account-current shews that this letter was re-
'ceived on the 23d January, on which date the remittance was
'placed to Mr Logan's credit, but the draft was not accepted,
'nor, consequently, placed to his debit, till the following day.
'But as this draft is the first which Mr Logan drew on the
'banking-house, it will follow, that if it is not to be taken into
'account, on comparing the remittances with the drafts under
'the new arrangements as on 23d January 1810, the whole sum
'of L. 916. 15s. 8d., received on that date, will fall to be applied
'to the old balance covered by the guarantee. But, on the
'other hand, if the Court should be of opinion that Fraser,
'Houston and Company, were entitled to apply such remittances,
'not only to the drafts actually accepted by the banking-house,
'but to those which they knew, by regular advice from Mr

May 22. 1829. 'Logan, had been drawn, and would be immediately presented 'for acceptance, then the whole bills remitted in Mr Logan's 'letter of 20th January 1810, will be exhausted by the draft 'advised in that letter, so as to leave no surplus to be applied to 'reduction of the old balance.

'The accountant, leaving this point for the determination of 'the Court, begs leave humbly to report two states of the 'account between the parties, framed upon the opposite views of 'that question.

'1*st*, Account shewing the balance of H. and R. Baird's ac-'count with the Honourable Simon Fraser and Company, stat-'ing Mr Logan's remittances to Fraser, Houston and Company, 'on the dates of his making them, and his drafts on the dates 'of his advising them; from which it will be seen, that, on this 'footing, the ultimate balance is not reduced below the sum 'claimed by the pursuers.

'2*d*, Account shewing the balance of said account, charging 'Fraser, Houston and Company, with Mr Logan's remittances, 'when received by them, and giving him credit for his drafts on 'the dates of acceptance; from whence it will be seen, that, on 'comparing his remittances with his drafts, upon this principle, 'the former at various periods exceeded the latter, so far as to 'reduce the balance due to the old firm of the Honourable 'Simon Fraser and Company to the extent of L. 522. 13s. 7d. 'below the balance claimed in this action.'

In the meanwhile the respondent, Mr Vile, as creditor and assignee of Fraser, Houston and Company, was sisted as pursuer, along with the executors; and the Court, on the 16th December 1825, 'approved of the principles of accounting adopted 'in the first branch of the report, according to which Mr Logan's 'remittances to Fraser, Houston and Company, are to be 'stated on the dates of his making them, and his drafts on the 'dates of his advising them; and in respect the parties differ as 'to the effect of the interlocutor already pronounced, appoint 'parties to prepare Cases on the effect of this interlocutor, and 'on such points of the cause as shall be shewn to be still unde-'termined.' Thereafter (12th May 1826) 'the Court, having 'advised mutual cases, &c. decerned and ordained the defenders, 'jointly and severally, to make payment to Oliver Vile, assignee 'of James Henry Houston, the surviving partner of the original 'pursuer, and now a party in the cause, of the sum of L. 5739. '11s. 7d., being the sum concluded for in this action, with inte-'rest of L. 5655. 10s. as a principal sum, from the 28th day of

'April 1811, and in time coming till payment;' and afterwards (12th December 1826) found the pursuer entitled to L.150 of modified expenses.* May 22. 1829.

Speirs, and the other sureties, appealed, and the executors and Vile cross-appealed.

Appellants, (Speirs, &c.)—1. It is undoubted law that all guarantees are strictissimi juris, not to be extended by implication, and to be enforced only in so far as the terms and conditions with which they are qualified have been observed. But the drafts subsequent to 31st December 1809 were not drawn upon and accepted by Simon Fraser and Company. They were the acceptances of the banking-house of Simon Fraser, Perring, Godfrey, Shaw, Barber and Company, and in account, not with Simon Fraser and Company, but with Simon Fraser, Houston and Company. These bills, therefore, are not covered by the appellants' letter of guarantee.

2. Although the appellants were liable for any balance, as at 31st December 1809, which is still resting owing, yet in point of fact there is no such balance remaining due. It is true that the respondents say that there was then a balance of L.7180, which by posterior operations has been reduced to the balance libelled; and they contend that the appellants must be liable for that balance. But although it is true that there were outstanding acceptances, as at 31st December 1809, amounting to L.7180, for which the appellants were responsible, yet those acceptances were provided for and retired in the manner pointed out in the letter of guarantee. The appellants thereby bound themselves that H. and R. Baird should remit good bills a certain number of days before the acceptances of Fraser and Company became due. The acceptances which were in the circle in December 1809, were not payable till January, February, and March 1810. But remittances were made in good bills to the full amount, before these acceptances fell due. Accordingly, when the account libelled is balanced, by these acceptances on the one hand, and the remittances on the other, there remains nothing due. But it is said, that because the obligation of the appellants terminated on 31st December 1809, the account must be balanced as at that date; that the bills remitted cannot be included, because they were subsequently granted; and that on

* 4. Shaw and Dunlop, No. 366.

May 22. 1822. this footing there is a balance against the appellants of L. 7130. But this mode of stating the account is inadmissible under the terms of the letter,—is contrary to mercantile practice,—and to the authority of various decisions, particularly that of Devaynes, (1. Merivale, p. 605.) By the practice of merchants, and particularly of bankers, in regard to cash-accounts, each payment is held to extinguish, either in toto or pro tanto, the previous debit side of the account; and this rule was given effect to in the case of Devaynes. In that case, Clayton was a customer of a bank of which Devaynes was a partner. At his death nothing was due to Clayton; but by subsequent transactions with the surviving partners a balance arose in favour of Clayton. On their bankruptcy he claimed against the estate of Devaynes; but Sir W. Grant held, that each item on the debit side is to be considered as discharged or reduced by the next item on the credit side, and that it is not competent to carry back the ultimate balance against a party who may, during the currency, have been under a responsibility. In the present case, the balance due at 31st December 1809 was greatly more than extinguished by subsequent remittances; and it was only towards the middle of 1810, when H. and R. Baird became embarrassed, that the balance began to bear against them.

3. But even were the remittances, as well as acceptances, after 31st December 1809, to be held as falling under the guarantee, the appellants would be liberated, because Fraser and Company failed to intimate to them that the balance at that date remained unpaid.

Respondents, (executors and assignees of Houston).—1. When the terms of the letter of guarantee, and the nature of the change in the form of drawing the bills, and the object and true situation of parties, are considered, there will be found no ground for depriving the drafts, after 31st December 1809, of the protection of the guarantee. There was no attempt to transfer the benefit of the guarantee, nor was there any extension or variation of the hazard run by the sureties. In point of substance, the drafts were on the agents of Simon Fraser, Houston and Company. But a person who, in accepting bills drawn on himself, relies on the security of a guarantee, cannot lose the benefit of it, because the bills are drawn at his request upon a third party, 'value in account with himself,' especially when the drafts are accepted by that third party by special mandate applicable to each acceptance?

2. At all events, the guarantee covered the operations of 1809; and these operations left a balance due the respondents of L. 7130. Of this sum (under the terms of the guarantee) the appellants were bound to replace L. 7000. The question must be taken as if, on the 31st December 1809, the sureties had been informed that the guarantee was not in future to be acted upon. Now, have the acceptances constituting the L. 7000 been paid or not? No doubt an excess of payment by Logan on the subsequent transactions operated as a payment pro tanto by the sureties, or rather diminished the guaranteed debt to the sum sued for; but to no greater extent. The appellants endeavour to escape from liability for the balance as at December 1809 by maintaining, that although the guarantee had become inoperative quoad the debit side of Logan's account, it continued as to the credit side. This could only hold if there were evidence that the remittances either were specifically, or by inference from circumstances, applicable to the discharge of the 1809 acceptances. But there is no evidence to that effect. The guarantee being as it were erased, the remittances made after it ceased to exist, cannot be held referable to it. The remittances before January 1810 were with reference to a debt due to Fraser and Houston, and secured by guarantee. Those after January 1810 were relative to a debt not secured by guarantee. The creditor, in absence of specific directions, appropriated, as he was entitled to do, the remittance to the debt least secured; and the circumstances authorize the respondents to consider that there was a specific application ordered. May 22. 1826.

3. The respondents incurred no liability by not giving intimation of the state of the balance.

The House of Lords ordered and adjudged, 'that the interlocutor of the Court of Session of the 4th March 1820, in so far as it altered the previous interlocutors in the cause and remitted to the accountant, and also the interlocutors (mentioning them by date) complained of in the original appeal, be reversed; and that the cross-appeal be dismissed; and that the several interlocutors of the Lord Ordinary, (mentioning them by date), and also the several interlocutors of the Court of Session, of the 10th December 1818, and the 4th of March 1820, in so far as it adheres to the previous interlocutors therein complained of, be affirmed.'*

* The result of the judgment is a simple adherence to the interlocutor of Lord Meadowbank. See p. 395.

May 22. 1829.

Appellants' Authorities.—Paisley, Jan. 13. 1779, (8228.); University of Glasgow, Nov. 18. 1790, (2104.); Philip, Feb. 21. 1809, (F. C.); M'Laggan, Nov. 19. 1813, (F. C.); Hammond, June 24. 1812, (F. C.); Taylor, Nov. 20. 1817, (not reported); 3. Wilson's Reports, 530.; 7. T. R. 254.; Fell on Guarantee, p. 126., &c.; 1. Starkie, Rep. 193.; 2. Bell's Com. p. 237.; Devaynes v. Noble, 1. Merivale's Rep. p. 605.; Reid, Jan. 29. 1792, (6818.); 6. Dow, p. 238.; Thomson, Jan. 29. 1822, (1. Shaw and Ballantine, No. 319.): reversed in House of Lords, (2. Shaw, p. 316.); 3. Ersk. 4. 2.; Buccleuch, Feb. 1725, (6807.)

Respondents' Authorities.—Spiers, June 22. 1822, (1. Shaw and Ball. No. 566.); Booth, May 16. 1823, (2. Shaw and Dunlop, No. 290.); Mansfield, June 9. 1749, (8224.); Hamilton, June 13. 1766, (8227.); Ewing, June 2. 1808, (App. voce Letter of Credit); 1. Bankt. p. 487.; Forbes, Nov. 9. 1739, (6813.); Cochrane, June 22. 1821, (1. Shaw and Ball. 103.)

RICHARDSON and CONNELL—GREGSON and FONNEREAU,—Solicitors.

No. 26.

ALEXANDER AND WILLIAM MALCOLMS, Appellants.
T. H. Miller—Rodger.

THOMAS YOUNG, Respondent.

Lease—Assignation—Bona et mala fides.—Circumstances under which it was held, ex parte, (reversing the judgment of the Court of Session), that an assignation of a building lease by a father to his sons was not collusive, and therefore sustained in a question with a creditor of the father.

June 5. 1829.

1ST DIVISION. Lord Eldin.

ARCHIBALD MALCOLM, in 1807, obtained from Crawford of Auchnames a building lease, for 999 years, of two pieces of ground in the village of Port-Crawford in the county of Ayr. In 1809, Malcolm borrowed L. 120 from Robert Montgomerie, repayable in 1813, and assigned the lease to him in security. Malcolm remained in possession; but the assignation was published at the market-cross of Ayr, and registered in the Sheriff books of the County, but was not intimated to the landlord. On the 14th November 1814, Malcolm, with consent of Montgomerie, sold the lease to Malcolm's two sons, Alexander and William, for L. 160. They stated, that they were upwards of forty years of age, and had borrowed L. 100 of this money, to prevent Montgomerie from selling the lease to a stranger, which he had threatened to do. They resided in family with their father, who they said was now an old man. The deed, which was an assignation written 'by the said Archibald Malcolm, acting as 'clerk to David Brydon, writer in Saltcoats,' and concurred in by Montgomery, bore, that the sons had paid the amount to

the father; and Montgomery acknowledged receipt, and discharged the L. 120 borrowed from him. The warrandice was from fact and deed only. June 5. 1829.

The assignation was recorded in the Sheriff Court books, and the sons alleged that they enjoyed the possession ostensibly; but they admitted that their father resided in the house along with them. The receipts for the rents were in their names; and in February 1816 they granted an assignation of the lease in security to the person from whom they had borrowed the L. 100, which was also recorded. In the meanwhile the father had, in 1812, granted a bill for L. 72 to Mr Crawfurd Tait, W. S. who indorsed it to his partner Mr Young, by whom an adjudication of the lease was in 1817 raised against the father.

The father entered defences, and the sons also appeared as defenders; but, (as was alleged), being unable from poverty to present an effective defence, decreet of adjudication in absence was pronounced in May 1820. Young having made the father a bankrupt, brought an action of reduction to set aside the assignation in security to Montgomery, and the after conveyance to the sons, alleging that these deeds had been latent—never intimated—granted retenta possessione to conjunct and confident persons, without any true, just, or necessary cause, or without any fair price, when the granter was in a state of insolvency, with a view to defraud the pursuer and other lawful creditors; and therefore reducible under the Acts 1621, c. 18. 1696, c. 5. and 54. Geo. III. c. 137. Decree in absence was pronounced; and Young thereupon raised a process of removing against the same parties.

The sons now instituted an action of reduction of these decreets, alleging that the assignation was valid, granted for an onerous consideration, and with perfect bona fides; and at the same time they brought a suspension of the decreet of removing. Lord Mackenzie found, 'that there was no evidence or 'reasonable ground for presuming, that the assignation in security 'of the lease of Archibald Malcolm in favour of Montgomery, 'or the assignation of Archibald Malcolm, with consent of 'Montgomery, to Alexander and William, sons of Archibald 'Malcolm, was fraudulent in any respect; but, on the contrary, 'there is reasonable evidence, proving that both of these assignations were made bona fide, and for a full consideration;—that 'the lease having been thus bona fide and onerously assigned by 'Archibald to his sons, the possession by them was sufficient to 'exclude the pursuer from having right to obtain the decree of

June 5. 1829. 'reduction, or to obtain the decree of adjudication, as valid or 'effectual against them;' and therefore reduced and suspended. Lord Eldin (having succeeded Lord Mackenzie as Lord Ordinary) altered, and repelled the reasons of reduction, and found the letters orderly proceeded in the suspension; and the Court adhered, with expenses.*

The Malcolms appealed. No appearance was made for Mr Young.

On *Miller*, for the appellants, opening the case,—

Lord Chancellor.—The appellant has done his duty, and appeared; but the absence of the respondent is really throwing a burden on the house, especially where the matter relates to Scotch law. I see nothing in the papers shewing the want of bona fides. Lord Mackenzie gives his reasons, and finds bona fides. Lord Eldin alters, but gives no reasons;—were there any reasons assigned by the Court?

Miller.—In a very short report of the case, (3. Shaw and Dun. No. 281.), the Court is represented as holding the transaction to be collusive. But the facts of the case altogether exclude such an inference.

Lord Chancellor.—As there is no respondent here, the proper way to proceed will be for your Lordships to look into the papers in the cause, and say on a farther day what your Lordships consider ought to be done.

Miller.—The appellants are too poor to be able to get a copy of the record; but we have the record itself, and we shall produce it if desired.

Lord Chancellor.—In particular circumstances, we allow the indulgence of no copy being produced. If necessary, we shall call for what you have.

The House of Lords ordered and adjudged, that the interlocutors complained of be reversed.

JAMES MOODY TAYLOR,—Solicitor.

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* 2. Shaw and Dun. No. 146. p. 158., and 3. Shaw and Dun. No. 281. p. 388.

WILLIAM TROTTER and Others, Appellants.—*Sol.-Gen.*—*Adam.* No. 27.

YOUNG TROTTER, Respondent.—*Sugden*—*Campbell.*

Foreign—Testament—Approbate and Reprobate.—A native of Scotland domiciled in India, but who possessed heritable bonds in Scotland, as well as personal property there and in India, having executed a will in India, ineffectual to carry Scotch heritage; and a question having arisen, whether his heir-at-law (who claimed the heritable bonds as heir) was also entitled to a share of the moveables, as legatee under the will;—Held, (affirming the judgment of the Court below), that the construction of the will, as to whether it expressed an intention to pass the Scotch heritable bonds, and the legal consequence of that construction, must be determined by the law of England.

June 10. 1829.

2D DIVISION. Lord Pitmilly.

COLONEL CHARLES TROTTER, a native of Scotland, went at an early period of life to the East Indies, where he was engaged in the military service of the Company for upwards of 30 years. In 1809, and subsequent years, he remitted various sums of money to his youngest brother, Mr William Trotter, merchant in Edinburgh, who acted as his attorney, and who deposited them in the Edinburgh Banks. In order to obtain better interest, he drew them out, and lent them to different individuals upon heritable bonds. He communicated to Colonel Trotter what he had done, and received in 1815 a formal power of attorney constituting him his sole commissioner and factor, with full power to receive and discharge all sums due or that might become due to him; and on payment to re-invest and re-employ the sums received, or any other funds that the Colonel might thereafter commit to his charge, on such good heritable or personal security as Mr Trotter might approve of, and to make up feudal titles, &c. Mr Trotter acted on this power; and the result of his operations was, that about L. 1900 were invested in Scotch heritable bonds. Colonel Trotter was also possessed of personal property in Scotland, and in India. In June 1829, without having ever returned to his native country, Colonel Trotter died at Pallamcottah, a remote situation, where legal advice could not be procured, and where, in May preceding, he executed his will, written by himself, in these terms:—

'I, Charles Trotter of Edinburgh, colonel in the East India 'Company's service, for the love, favour, and affection which I 'have and bear to Major-General Thomas Trotter, Mr Young 'Trotter, and Mr William Trotter, my brothers, and to my

June 10. 1829. 'sisters, Mary, wife of Mr John Pitcairn, and to Miss Christiana 'Trotter, and to Mr Alexander Pitcairn of Edinburgh, husband 'of my sister; and considering it to be my duty, while in health, 'to execute a settlement of all my estate and effects which may 'belong to me at my death,—For this purpose, I do hereby con- 'stitute, make, and ordain my brother, Young Trotter, of 'Broomhouse Mill, Dunse, and William Trotter, merchant in 'Edinburgh, to be my executors of this my last will and testa- 'ment in Great Britain, and trustees also for the estate of the 'late Captain Dickson, of which I am executor and trustee for 'the children, and to which I nominate Mrs M. Trotter, jointly 'with the house of Messrs Arbuthnot, De Monte, and Company, 'executors, in India; and farther, I do hereby constitute, make, 'and ordain Messrs Arbuthnot, De Monte, and Company, of 'Madras, to be my executors in India, and trustees for bonds, 'bills, and vouchers of every kind; and farther, I hereby nomi- 'nate the said Messrs Arbuthnot, De Monte, and Company, of 'Madras, but in trust only, and to the end and for the purpose 'after mentioned—*First*, That they make payment of all my just 'and lawful debts: *Second*, That for the love and affection I bear 'to my sister-in-law, Matilda Trotter, widow of my deceased 'brother, Robert Trotter, they make payment of the sum of two 'thousand (2000) Star Pagodas: *Third*, That they hold in their 'hands the sum of two thousand (2000) Pagodas, for the sole 'benefit of Charles Trotter, a native of India, to be disposed of 'to best advantage: *Fourth*, That they remit the residue and 'remainder of my India estate, as they realize it, to Europe, after 'deducting all expenses of management, to my above-named 'brothers in Edinburgh, my executors in Europe, Young Trot- 'ter and William Trotter, who are hereby instructed to divide 'the remainder of my estate as they receive it from India, and 'the whole of my property in Europe, into six equal shares, to 'be paid to each of them, viz. Thomas Trotter, Young Trotter, 'William Trotter, Mrs Mary Pitcairn, Miss Christiana Trotter, 'and Mr Alexander Pitcairn of Edinburgh, share and share 'alike, or to the lawful issue of such of them as may be dead. 'In witness whereof, I have hereunto set my hand and seal, at 'Pallamcottah in India, the 28th day of May in the year of our 'Lord 1819.'

The will was signed and sealed before two witnesses. The Indian executors proved, and transmitted home an exemplified copy of the will.

Colonel Trotter had originally four brothers, but was surviv-

ed by only the two youngest, Young Trotter and William Trotter. June 10. 1828.

As the will did not pass real property in Scotland, Young Trotter made up titles to the heritable bonds in the character of heir of line and conquest. He also claimed his portion of the moveables under the will. His brother and sisters objected, that if he betook himself as heir to the heritage, he could not claim any share of the moveables. He denied that he was obliged to make his election. To settle the disputed point an action of declarator was raised by Young Trotter, to have his right declared, and for payment; and the executors, in order to have the opinion and direction of the Court, brought an action of multiplepoinding against all concerned.

The Lord Ordinary sustained the defences by the legatees, and preferred them to the fund in medio, in terms of their claims.

On the cause being carried into the Inner-House, a joint Case was directed, for the opinion of English Counsel, on the question, 'What would be the construction and effect of the testator's 'will, according to the law and practice of England, so far as 'the interests of the parties to this case are concerned?' Accordingly the opinion of Mr Shadwell* and Mr Scarlett† were taken on a series of queries, which, with the answers, are subjoined.‡ The last brings out the point at issue: 'Whether, on the sup-'position of the question having arisen for trial in England, the 'heir would have been put to his election, if he had claimed 'money secured by heritable bond in Scotland, as well as his 'share of the personal estate under the will?'—*Answer.* 'Con-'sidering heritable bonds in Scotland as real estate, to which 'the heir-at-law is entitled, unless they are conveyed away by 'his ancestor with due solemnity, we think the heir-at-law would 'be entitled, in this case, to claim them without being put to his 'election, if the question had arisen in a Court of justice in 'England.'

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* Now Vice-Chancellor. † Now Attorney-General.

‡ 1. Whether the will would be held sufficient to pass real property by the law of England?

We are of opinion, that the will would not be held sufficient by the law of England to pass real, that is, freehold property.

2. If it would not be held sufficient for that purpose, what are the particular grounds on which it would be considered in England insufficient for that purpose?

Because it is not attested by three witnesses, in the manner required by the Statute of Frauds.

3. If the will be not sufficient to pass real property, does it so express the testator's

June 10. 1829. Thereupon the Court altered the interlocutor, and found that Young Trotter was entitled to the legacy left to him by the will out of the personal estate, without being obliged to collate any part of the sums secured by heritable bonds, to which

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intention that it would put the heir to his election in any competent Court in England, whether of law or equity, if he had claimed the English real property, as well as his share of the personal estate under the will?

We are also of opinion, that the will does not so express the testator's intention as to the freehold property, as that it would put the heir to his election in a Court of equity in England, if the heir had claimed the English freehold property, as well as his share of the personal estate under the will.

4. If the words of the will are so defective in form and in meaning, according to the construction of such words by the law of Scotland, that they do not express it to be the meaning of the testator to pass heritable rights in Scotland, would the heir be put to his election in any competent Court, whether of law or equity, in England, were the question to arise there?

Upon the supposition which is put in the fourth question, we think that the heir would not be put to his election in any competent Court in England, either of law or equity, were the question to arise there.

5. Taking into consideration the relative circumstances under which the heritable bonds were severally granted, with reference both to the time of Colonel Trotter's death, and to the authority under which they were heritably invested by his attorney, does the same general principle apply equally to all of them?

We are of opinion, that the same general principle applies equally to all the bonds.

6. What would be the determination of any Court of law or equity in England, in regard to heritable or real property vested by the attorney, under circumstances which left Colonel Trotter in ignorance that the money was so vested at the time he made his will, and when he died? Would the heir, with regard to such real subjects, be put to his election?

We are of opinion, that though Colonel Trotter might be in ignorance that his money was vested in heritable property at the times when he made his will and when he died, yet, as the power of attorney authorized an investment in heritable security, the heir would not, with regard to such real subjects, be put to his election; but that, notwithstanding Colonel Trotter's ignorance of the actual mode of investments, the heritable or freehold property would, in any Court of law or equity, be deemed such as it actually was at the death of the Colonel.

7. On the other hand, what effect would be given to the circumstance, that an heritable or real security, which Colonel Trotter had previously approved of, and which exceeded in amount the new investments alluded to in the preceding query, had been uplifted by his attorney under circumstances which left Colonel Trotter in ignorance that the money had been so uplifted at the time he made his will, and when he died? Would that circumstance affect the heir's obligation to elect as to the posterior real investments alluded to in the preceding query?

We are of opinion, that if an heritable or real security, which Colonel Trotter had previously approved of, and which exceeded in amount the new investment alluded to, had been uplifted by his attorney under circumstances which left Colonel Trotter in ignorance that the money had been so uplifted at the times when he made his will and when he died, that circumstance would not affect the heir's obligation to elect as to any posterior real investments alluded to in the sixth query. But having regard to the terms of the power of attorney, whether the Colonel's pro-

he was entitled to succeed as heir, and decerned accordingly. June 10. 1829.
And on reconsidering the question, on Cases, adhered.*

William Trotter, and others, the residuary legatees, appealed.

Appellants.—1. This is a question of equity. A Court will not permit a party to take that which cannot be his but by virtue of the disposition of the will, and at the same time to keep what by the same will is given, or intended to be given, to another person. No person can accept and reject the same instrument. That rule is common to both England and Scotland. In order to apply this rule, it is only necessary to inquire, Whether the testator has plainly and unequivocally expressed his intention to pass both heritable and moveable property? The terms of the will, and the admitted extraneous circumstances, shew that he did intend to convey his moveables in India, and his whole property in Europe, without distinction. With that reading the expressions of the will are lucid and consistent; but, according to the respondent's view, the terms cease to receive their ordinary and authorized acceptation. The testator may have been in a mistake, when he thought that both real and personal property could be administered and divided by executors; but if he totidem verbis, or by plain inference, did by intention pass both to be held for the behoof of the legatees, that is enough to support the appellants' doctrine. The respondent, therefore, in seeking to take the heritable property, acts against conscience, and defeats the testator's purpose; and, if he persists in claiming as heir-at-law, must leave all the moveables to the legatees.

2. The opinions of the English Counsel may be well-founded, and yet not touch the present question. This is not a suit as to real estate in England, but as to Scotch heritable bonds; and although it may be necessary to resort to the opinions of foreign lawyers, to clear up mere technical and formal difficulties in foreign instruments, no such necessity exists to discover what

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party was money in the hands of his attorney, or heritable security, it must, as between his heir and executor, be taken to be such as it in fact was at the time of the Colonel's death.

The use of the word "real," that is, freehold property, appearing ambiguous, the additional question was put, and the answer received as in the text, p. 409.

* 5. Shaw and Dunlop, No. 57.

June 10. 1829. was the intention of the party by whom the instrument was executed. The Scotch Courts ought to have light enough in themselves to determine that point; and reference to English authority should be the more avoided in the present matter, as the very question of intention seems, in the law of England, to be dependent on names and technical views. But if the Scotch Courts are to decide on the intention, no difficulty can remain as to the result. The terms of the will, although not sufficient feudally to pass the heritage, leaves no doubt that de facto he did intend both heritage and moveables to be held for the legatees.

Respondent.—1. Before evidence of intention can be gained, the will must be expounded; but as it is disputed by what law that exposition is to be made, that inquiry must have precedency. The testator's will must be regulated by the law of England. He was domiciled in India,—executed the will there according to the formalities and solemnities of the English law—the law which regulated his moveable succession. India was the forum domicilii et contractus, and, in the eye of the law, the locus rei sitæ. In inquiring, therefore, what the testator meant, recourse must be had to the English law. It is only that law which can give, as it were, the legal translation of the will. His intention must be held to be what the English law decides; and there is no more room nor excuse for interposing the Scotch law on that point, than if it were proposed to adjudicate, according to Scotch principles, what was the kind of English property which the words passed. There is no authority for limiting this doctrine to mere technical expression. It is a general rule, and, if departed from, would lead to the utter defeat of a testator's real intentions, and create collision in the judgments of the two countries. The proper Court in which this question ought to have been tried was an English or Indian Court; and they certainly would not have looked to the law of Scotland for the means of reaching the testator's intention. Besides, it is only ex comitate that the Scotch Courts entertain an English will, where the object is to affect indirectly, through the English will, Scotch heritage; but still the will must be construed according to the law of England. Formerly, no doubt, the Scotch Courts were in the use of giving their own interpretation of such foreign deed as they had occasion to decide upon; but this practice was corrected by a series of reversals by the House of Lords, and latterly has been altogether abandoned. Foreign law is a fact, and must be proved as a fact; and when proved, must be acted upon as such.

2. The opinions of the English Counsel establish, that no question of election is raised in the present case, and their opinions are well founded. In order to create such a question, there must appear upon the face of the instrument a clear and manifest intention to pass the particular estate as to which election is to be raised. Mere general words will not have that effect. The point must be raised in the most direct and express terms. Neither is it permitted to travel into other matters to find out the intention,—you cannot go *dehors* the will. But the will itself, fairly construed, does not afford such plain and decisive evidence of intention to pass both heritage and moveables, as is required to put the heir to his election. There may be surmises, or guesses, that the testator might have intended more than the words speak out. But looking to the words themselves, heritage neither was passed, nor intended to be passed. The testator knew that part of his property was invested in heritable bonds; and had he intended that his heir should not take these heritable bonds, he would have executed the instrument proper to effect that object, or, at all events, he would have plainly avowed what in this respect were his wishes. June 10, 1829.

The House of Lords ordered and adjudged, that the interlocutors complained of be affirmed.

Lord Chancellor.—My Lords, There is another case which stands for your Lordships' judgment, that of Trotter v. Trotter, which is an appeal from various interlocutors pronounced by the Second Division of the Court of Session. The facts of the case I shall state in a very few words to your Lordships. Colonel Trotter had been long resident, in a military capacity, in India. He died there in 1819, having shortly previous to his death made his will; and it is upon the construction of this will, and the circumstances arising out of it, that the question depends. Colonel Trotter, at the time of his death, left two brothers, Mr Young Trotter and Mr William Trotter. The latter then acted as his agent in Edinburgh. Colonel Trotter had been in the habit of sending, from time to time, to Mr William Trotter, money, for the purpose of being invested in securities in Scotland. The money was originally invested only in personal security; but William Trotter took upon himself (thinking it would be more advantageous for his brother) to call in a part of that property to lay it out in heritable bonds. This was afterwards communicated to Colonel Trotter,—he did not disapprove of it; and a power of attorney was sent out to Colonel Trotter, three or four years before his death, for him to execute,—authorizing his brother, William Trotter, to call in his property, and to reinvest it either upon personal or upon heritable securities.

June 10, 1829. A part of the property was vested in heritable securities at the period of the death of Colonel Trotter,—a sum above L.1900. This, by the law of Scotland, is real property; and it is perfectly clear, and has not been disputed, that the monies so invested upon heritable security, being real property, did not fall by the will. The consequence was, that Young Trotter, who was the immediate heir, claimed and made up titles to this, which was real property, and also claimed his portion under the will. That was contested by the other legatees; and a suit was instituted in Scotland by Young Trotter, for the purpose of obtaining a declaration of his right; and also a multiplepoinding was instituted by the other parties: and under these two proceedings, interlocutors were pronounced, from which this appeal has originated.

One question, and a most material and important question was, *how* the will, which was executed in India, was to be interpreted? by what law? It was considered in the Court below, and undoubtedly it was held most properly, that the will was to be interpreted by the law of the land where it was made, and where the testator had his domicile, namely India, that is, by the law of England; and it was held, and properly held, as I conceive, by the Court below, that although that will was the subject of judicial inquiry in the Courts of Scotland, the same rule was to be applied to the interpretation of it, as if the will had been the subject of consideration and adjudication in the Courts of England. I think the Court of Session, in this respect, decided with perfect correctness.

The next question was, how the Court of Session were to ascertain what the law of England was with respect to this will? how this will was to be interpreted, according to the law of India, or, in other words, according to the law of England? They followed that course which had been adopted on other occasions, in the cases of Robertson v. Robertson,—Wightman v. Delile's trustees, and other cases,—the course which they have been in the habit of taking to ascertain how the law stood,—namely, to direct a case to be prepared, stating all the circumstances necessary for the purpose of raising the question of law, for the opinion of lawyers in this country. Accordingly, by one of the interlocutory decrees, it was directed that cases should be stated on both sides. It was afterwards agreed, that a joint case should be stated, with the concurrence of both parties; and that the opinion of the present Vice-Chancellor and the present Attorney-General should be taken, with respect to the import of this will according to the law of England.

My Lords,—It was said at the Bar, and I see by the papers it was also argued below, that, in cases of this description, it is not unreasonable that, when any technical points arise in the construction of a will of this description, the Court of Session should resort to the opinion of lawyers of the country where the will or instrument was executed; but that this applies only to technical expressions,—that, where a will

is expressed in ordinary language, the Judges of the Court of Scotland are as competent to put a proper construction upon it as Judges or lawyers of the country where the will was executed. But, my Lords, the Judges below were not of that opinion; and it is impossible, as it appears to me, that such an opinion can be reasonably entertained. A will must be interpreted according to the law of the country where it is made, and where the party making the will has his domicile. There are certain rules of construction adopted in the Courts, and the expressions which are made use of in a will, and the language of a will, have frequently reference to those rules of construction; and it would be productive, therefore, of the most mischievous consequences, and in many instances defeat the intention of the testator, if those rules were to be altogether disregarded, and the Judges of a foreign Court, (which it may be considered, in relation to the will), without reference to that knowledge which it is desirable to obtain of the law of the country in which the will was made, were to interpret the will according to their own rules of construction. That would also be productive of another inconvenience, namely, that the will might have a construction put upon it in the English Courts different from that which might be put upon it in the foreign country. It appears to me, my Lords, that there is no solid ground for the objection; but that where a will is executed in a foreign country by a person having his domicile in that country, with respect to that person's property the will must be interpreted according to the law of the country where it is made. It must, if it comes into question in any proceeding, have the same interpretation put upon it as would be put upon it in any tribunal of the country where it was made. It appears to me, therefore, that the Judges were perfectly right in directing the opinion to be taken of English lawyers of eminence, with respect to the import and construction of this will according to the law of England. June 10. 1822.

My Lords,—The main question that was ultimately put to the learned persons to whom I have referred is this, 'Whether, on the supposition 'of the question having arisen for trial in England, the heir would have 'been put to his election, if he had claimed money secured by heritable bond in Scotland, as well as his share of the personal estates 'under the will?' The answer is in these terms,—'Considering heritable bonds in Scotland as real estate, to which the heir-at-law is 'entitled, unless they are conveyed away by his ancestor with due 'solemnity,—we think the heir-at-law would be entitled in this case to 'claim them without being put to his election, if the question had 'arisen in a Court of justice in England.' When that opinion was communicated to the Court in Scotland, the Court immediately affirmed that opinion, and decided in favour of the heir-at-law. The heir-at-law was undoubtedly entitled to take the real estate, that is, the heritable bond; and the sole question was, whether, when he came in to claim under the will his proportion of the personal estate, it was

June 10. 1829. reasonable that he should be put to his election, that is, whether he would take the one or the other? whether he would allow the real estate to be connected with the personal, so as to form one mass of the property, and the whole divided, or he would take the real estate and give up the personal estate? Whether he was obliged or not to do this, depended entirely on this consideration—whether, upon the face of the will, there was sufficient to manifest a clear intention, that the testator designed by his will to dispose of his real estate? Because, if he intended to dispose of his real estate, although he had not carried that intention effectually into execution, the party taking under that will would not be entitled to have the benefit of the will, and at the same time to defeat the intention of the testator. The question was therefore simply a question of construction:—Does it appear upon the face of the will, that it was the intention of the testator to dispose of his real estate, that is, of these heritable bonds? Now, my Lords, the rule of law in England, with respect to subjects of this kind, is well ascertained, and well defined, and it is this,—That you are not to proceed by probability or by conjecture, but that there must be a clear and manifest expression of the intention, on the face of the will, to include that property which is not properly devised, before the heir can be put to his election.

My Lords,—It has been contended at the Bar, that the construction put upon this will by the learned Counsel whose opinions have been taken by the Court of Scotland, was erroneous. My Lords, I have looked at the opinion, and read it carefully over several times, and I see no reason for dissenting from the construction which is put upon this will. There are words in this will sufficiently large to carry the real estate; but comparing one provision of this will with another, it chiefly points to personal estate, and to personal estate only. Executors are appointed—nothing is given to the executors, but they take merely by virtue of their character as executors; they take personal property only. There are executors appointed in Scotland; there are executors appointed in India; and the executors in India are directed to remit the residue, after payment of debts and legacies, to the executors in Scotland; and then the whole of the residue of the Indian estate, and the whole of the property in Scotland, are directed to be divided into six portions, and paid to the respective legatees. Throughout all these provisions there is nothing to satisfy my mind, with that clearness which is necessary to raise a case of election, that it was the intention of the testator to dispose by this will of the heritable bonds. If I am asked to conjecture what his intention was, I have no hesitation in saying that I should conjecture that it was his intention; but there is not such an expression of intention on the face of this will, as I think can justify your Lordships in giving it that effect. It is nothing more than conjecture. The intention is not expressed as it ought to be, for the purpose of raising a case of election. I beg leave therefore to say, that I concur in the opinion expressed by the learned individuals to whom I have re-

ferred; and I think, under these circumstances, I must recommend to your Lordships to affirm the judgment in the Court below. June 10. 1829.

Appellants' Authorities.—Kerr v. Wauchope, 1. Bligh, No. 1.; Robertson, Feb. 16. 1816, (F. C.); Dundas, Feb. 25. 1783, (15,585.); Gibson, June 20. 1786, (620.); Martin, March 4. 1794, (not reported); affirmed in House of Lords; Henderson, Jan. 31. 1797, (15,444.); reversed in House of Lords, May 29. 1802; Robertson, May 25. 1812, (not reported); Minto, Feb. 14. 1823, (2. Shaw and Dunlop, No. 166.); affirmed in House of Lords, (1. Wilson and Shaw, p. 678.); 2. Vesey and Beames, 125.

Respondent's Authorities.—1. Voet, 4. 19.; 23. 2. 85.; 28. 5. 16.; Voet de Statutis, 9. 2. 10.; 3. Erskine, 2. 39. and 42.; Hay Balfour, March 11. 1793, (affirmed 10. F. C. App. 1.); Dundas, Feb. 25. 1783, (15,585.); Henderson, Jan. 31. 1797, (15,444.); reversed ut supra; Wightman, June 16. 1802, (F. C. App. 1.); Robertson, Feb. 16. 1816, (F. C.)

JAMES CHALMERS—SPOTTISWOODE and ROBERTSON, Solicitors.

JOHN LEE ALLEN, Appellant.—*Sol. Gen.*—*Adam.*

JAMES BERRY, Respondent.—*Murray*—*Campbell.*

No. 28.

Lease.—A way-going tenant, whose ish was from the houses and grass at Whitsunday, and from the arable land at the separation of the crop from the ground; and who was bound to consume on the farm the whole fodder, except hay and the fodder of the last crop; and undertook sufficiently to cultivate, labour, and manure the land,—found entitled (affirming the judgment of the Court of Session) to the value of the straw remaining on the farm at the way-going Whitsunday, (not amounting to more than necessary for the purposes of the farm until the possession expired), and to the dung made since last wheat seed time; it having been the tenant's unchallenged practice, and agreeable to the received rules of good husbandry in the district, to preserve the manure for the wheat crop.

June 10. 1829.

2D DIVISION. Lord Cringletie.

THE Appellant, John Lee Allen, Esq. of Errol, let to the respondent, James Berry, two farms, the one called Daleally, and the other Loan of Errol, for 19 years and crops from and after the term of entry, which was declared 'to have commenced at 'Whitsunday 1802, as to the houses, yards, and natural grass, 'and as to the land at the separation of the crop 1802 from the 'ground.' By the lease, Berry bound and obliged himself 'to 'consume upon the ground of the said subjects the whole fodder 'that shall be raised thereupon, except* hay; but the whole 'fodder of the last crop on the farm of Daleally, notwithstanding 'the above restriction, he shall have liberty to dispose of as he 'shall think proper, saving always the landlord's right of hypothec for the rent; and also, the said James Berry binds and

* In Vol. v. of Shaw and Dunlop, p. 213. for *from* read *except*.

June 10. 1829. 'obliges himself, and his aforesaid, to sufficiently cultivate, dung, 'labour, and manure the lands hereby set, and not to cross crop, 'or in any ways waste or deteriorate the same; but, on the con- 'trary, to use all proper means for meliorating and improving 'the said lands.' It was also declared, that 'the said James 'Berry, or his aforesaid, shall not be at liberty to lay any of the 'dung and straw remaining on the Loan farm, after finishing the 'wheat seed of the last crop under this lease, upon any of the 'lands for the last crop; but the whole of such dung and straw 'shall be reserved for, and delivered over to the proprietor, or 'incoming tenant, at the time of their entry, without any con- 'sideration or recompense for the same.'

When Berry entered into possession, he paid nothing for the straw and manure which was on the Loan farm; but he purchased the straw and manure from the outgoing tenant on the Daleally farm. The practice adopted in the Carse of Gowrie, where these lands lay, seems to have been, on sowing the autumn wheat seed, to apply to the lands the whole dung made since the last wheat seed time, except what had been consumed on the potatoes and turnips in the spring. This mode of cultivation Berry followed in the first year of his lease, and continued to work his farm without challenge, on this or any other account, down to June 1821, the last year of the tack. By this time Berry had removed from the houses, yards, and natural grass, but he was still entitled to the possession of the lands, (under exceptions stipulated by the leases, but which are immaterial to the question at issue), until the separation of the wheat crop from the ground. On the farm of Daleally he had a considerable quantity of straw, the produce of the preceding crop, but not more than was necessary for the purposes of the farm during the remainder of his possession after Whitsunday. He also had a quantity of manure, the surplus of the manure beyond what was required to be laid on the farm since the last wheat seed time. The straw and the manure Berry considered he was entitled to sell either to the landlord or the incoming tenant. The landlord entertained a different opinion, and in June applied to the Sheriff of Perthshire, praying him to order a valuation to be made of the straw and dung left on the possession of Berry at Whitsunday, and to find that the landlord was not liable in the price or value of any of the dung so left by Berry; or, at any rate, of that part thereof which ought to have been applied to the lands with the present crop; and that the landlord was not liable for the straw remaining on the possession, which, in terms

of the lease, ought to have been consumed on the possession. The Sheriff having appointed inspectors with particular instructions, on receiving their reports, (October 1821), found, 'as to 'the dung left on the farm, that, by the express stipulation of the 'tenant's lease, he was bound to consume upon the ground of 'the said subjects the whole of the fodder that shall be raised 'thereupon but hay, except the fodder of the last crop: Finds it 'reported by the inspectors, that no dung has been made since 'the period of last bear seed time; and therefore, that the whole 'dung in the premises is derived from the fodder which he was 'bound to have consumed on the ground, and which by law he 'was bound to have laid upon the land for its due cultivation, 'and therefore that he is not entitled to any remuneration for it 'from the landlord: Finds, as to the straw, that there is not 'more on the possession than was necessary for the purposes of 'the farm till the fodder of the present crop can be brought in- 'to use, and decerns.'* June 16. 1829.

Berry advocated, and maintained, that the landlord was bound to pay the value of the straw and of the dung left on the farm, which the landlord had bestowed on the incoming tenant; and that the value placed on the straw and dung was inadequate.

The Lord Ordinary, before answer, appointed Berry to condescend particularly 'with respect to the rotation of labouring, 'manuring, and cropping, followed by him on the farm in ques- 'tion, for the seven years immediately preceding the expiry of the 'lease;' and also as to what took place with respect to the fodder and dung left by his predecessor in the farm at the commencement of the lease,—whether he received the same gratuitously or by a valuation. Thereafter the Lord Ordinary issued the subjoined note,† and directed a more specific statement as to the mode of cultivation.

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* During these proceedings, the Sheriff, in respect of the sworn valuations, authorised the landlord to take possession of the dung in question, on his finding caution to pay such sum as might be awarded by the Court as the value of the dung;—and the landlord gave possession thereof, and of the straw, to the incoming tenant.

† In this case, the questions are properly, 1*st*, To what quantity of dung the 'landlord is entitled, without paying for it? And, 2*d*, Is he entitled to the straw of 'crop 1820, remaining at Whitsunday, without paying for it?—On this latter point, the 'Sheriff's interlocutor is silent. The obligation in the lease is, that the tenant shall "consume upon the ground of the said subjects the whole fodder that shall be raised "thereupon, except hay; but the whole fodder of the last crop on the farm of Dalcally, "notwithstanding of the above stipulation, he shall have liberty to dispose of as he shall "think proper." Nothing is here said about dung; but there follows an obligation

June 10. 1829. On resuming consideration his Lordship, for the reasons assigned in the subjoined note,* and 'particularly that it is asserted

'sufficiently to cultivate, dung, labour, and manure the lands hereby set," which, of 'course, as well as the common law, obliged him to dung sufficiently the land for the 'last crop, as well as any other during the lease; and if he did not do so, he is cer-'tainly not entitled to payment of any dung, which ought to have been put on the 'ground, in conformity to the practice of the seven years preceding the expiry of his 'lease; while, on the contrary, he is entitled to payment for all that was left, over and 'above what ought to have been used. It was for this purpose, and to ascertain the 'practice, that the Lord Ordinary ordered the condescendence; and he must say, that 'the order has been evaded, as it is impossible to discover how much of the farm was 'under different crops, during each of the seven years, (*i. e.*) into what breaks or por-'tions it was divided,—what sort of crop was taken from each,—how much was 'manured,—and how many cart-loads of dung were laid on each acre. One thing 'the Lord Ordinary can discover in the confusion, which is, that there were potatoes, 'turnips, and tares, for all which the land was dunged. The quantity of ground is 'not indeed specified, but it must have been considerable, because next year barley 'or oats, or both, would be sown on the ground. But in the last year of the lease, 'twelve acres only are said to have been set apart for potatoes and turnips, and dunged, 'six of which the incoming tenant got. The Lord Ordinary observes, that, by the 'lease, the incoming tenant was entitled to fifteen acres of summer fallow at the term 'of Martinmas 1820. This also may have an effect on the question; and, therefore, 'the advocator must comply distinctly with the order contained in the interlocutor, '12th June 1822. One thing appears quite clear, viz. that the interlocutor of the 'Sheriff may perhaps go much too far. It is dated 24th October 1821; and finds, that 'no dung has been made since the period of the last bear seed time; and, therefore, 'that as all the dung on the farm must have been made from the fodder which he was 'bound to consume, "and which, by law, he was bound to have laid on the land for "its due cultivation," he is not entitled to payment for it. This part of the find-'ing may perhaps be quite wrong. Every one in the least acquainted with farm-'ing knows, that the great bulk of the dung made on a farm, is made during the 'winter and early spring months; in summer generally little is made. If, therefore, 'wheat be sown in harvest on summer fallow, and dung be given to it, the advocator 'was not bound to lay all his dung on the land; for this obvious reason, that he was 'bound to remove from the land, on which part of his dung would be used. This, too, 'makes it necessary to know the rotation. 2*d*, As to the straw, it is ascertained that 'no more remained on the farm at Whitsunday 1821, than was necessary for the pur-'poses of the farm; which proves, that the advocator had not unduly saved the straw, 'but had consumed it in the same manner as he used to do during his lease; because 'he must always have reserved, in each year, as much as to serve him till the straw of 'the new crop could be obtained. But it does not from thence follow, that he is 'entitled to the value of that straw. He might have consumed it by additional winter 'cattle; and if he had, he would have had so much the more dung, for which he 'might have received payment. It therefore appears to the Lord Ordinary as equi-'table, that the advocator should receive the value of the quantity of dung which 'might have been made from the straw if it had been consumed, which may be easily 'ascertained by those who saw the quantity of straw. But this he reserves for future 'consideration, when the whole merits are ready for judgment.'

* 'The Lord Ordinary has advised this cause, and will explain his views to the 'parties. Law is a science which must vary with the manners and customs of society,

'by the advocator, that he applied the manure made in his farm June 10. 1829.
'to the land thereof in the autumn and winter of the year 1820;
'and in the spring 1821, in the same manner as he had done in
'the former years thereof, which is not denied by the respon-

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'and improvements in any department. And consequently it appears to him impossi-
'ble, that any judgment of this Court, applicable to the mode of agriculture forty years
'ago, can regulate it now when the system is greatly improved, nor that a judgment
'applicable to one sort of land can govern the management of a soil totally different.
'For instance, in many (alas! too many) parts of Scotland, wheat cannot be raised
'with advantage; and, consequently, as all the crops are sown in the spring, the
'manure made in the winter ought to be applied to the land in the spring season, in
'so far as is not necessary for the land under turnips, which are generally sown in
'the end of May and beginning of June. On the contrary, where wheat is a prin-
'cipal crop, it is always sown with dung; and if it be sown in autumn, or be-
'ginning of winter, it is manifest that this dung must have been chiefly raised in
'the preceding winter and spring. Almost no dung is made in summer. To say,
'then, that the advocator, if it was his practice to bestow his dung on his wheat,
'was bound to lay the winter and spring-made dung on his spring crops, is to say
'that the incoming tenant could have no wheat sown the year of his entry to pos-
'session, unless on the ground which had been under potatoes and turnips that year.
'The question at issue is not, whether the advocator's mode of management was the
'best, or whether it was exceptionable? The presumption that it was good is in his
'favour, as there neither was nor is in the petition to the Sheriff any complaint of mis-
'labour. The dispute is respecting the quantity of dung to be paid for by the in-
'coming tenant. The advocator has sufficiently distinctly explained, in his conde-
'scendence, his rotation of crops and his mode of manuring. He says, that to his
'wheat, whether sown in winter, perhaps in spring, but whichever it was, he used on
'it all his dung, except what he applied to turnips and potatoes in spring. This may
'be bad management; but the Lord Ordinary must repeat, that this is not the ques-
'tion. The advocator further condescends, that he used the same quantity of dung to
'the last crop that he did to former ones; and as this is not denied, the Lord Ordi-
'nary holds it to be true. Holding it then to be true, that as much dung was to be
'used by the advocator in the last year of his lease as he used in former years, and
'that he did not vary his practice, the Lord Ordinary denies the conclusion drawn by
'the Sheriff; viz. That the advocator was bound by law to have laid the whole dung
'on the farm in spring on the land. The Lord Ordinary knows enough of farming
'to affirm, without hazard of contradiction, that it is desirable to have a farm put under
'a course of good management, and so as that the incoming tenant, where a change of
'tenants is necessary, can continue the same system observed by his predecessor. In
'this case, the Lord Ordinary presumes the system of the advocator to have been
'good, since there is no complaint of it. Clear it is, that it is a farm on which large
'quantities of wheat grew annually; and if all the dung made in winter and spring
'had been laid on the land, there could have been no autumn or winter sown wheat
'that year; so that the interlocutor of the Sheriff would disturb the regular course of
'management of the farm.' The decision quoted by the respondent, has no applica-
'tion to this cause. In that case (19th February 1808, Forrester v. Wright) the
'tenant was explicitly bound 'to eat and consume the whole straw growing on the said
'lands with his bestial, and lay the whole dung thereon the last year of the tack at
'bear seed time.' The judgment, then, was neither more nor less than finding, that
'a tenant must implement his lease; but here there is not a word in the tack about
'dung.'

June 10. 1829. 'dent; advocated the cause, altered the interlocutor of the 'Sheriff, and found that the advocator is entitled to be paid' for the fallow grass and dung left to his successor in the farm, according to the average of the three inspectors' reports, with expenses. The landlord represented, and relied on various decisions, establishing, as he maintained, that the manure made before bear seed time was his property. Thereupon the Lord Ordinary issued an explanatory note,* and ordained Berry to

* 'The Lord Ordinary has observed, that law being calculated to preserve the fair 'and honourable conduct of mankind to each other, must in every case, wherever that 'conduct does not depend on fixed and immutable principles, vary with the im-'provements made in the course of knowledge, extended by experience; and nothing 'can afford a better illustration of this than the application of law to the practice of 'agriculture. The law says, that a tenant shall act tanquam bonus vir. This is an 'immutable principle: But what is the conduct boni viri, required by the law, de-'pends on the practise of agriculture, and the improvements made on it. The repre-'senter quotes cases without attending to this. For instance, that of Trotter of Mer-'tonhall against Finnie, 27th June 1767, fifty-six years ago, is appealed to. But this 'just demonstrates the truth of the doctrine above inculcated. Finnie removed at 'Michaelmas 1764 from the farm of Swanston, on the north side of the Pentland 'hills, leaving a quantity of dung, for which he demanded payment; and he was 'found entitled to payment of all the dung that had been made after bear seed time in 'that year, but not to the payment of what had been previously made. It appears 'that Finnie pleaded, that he had been in the practice of using his dung on the wheat 'land in winter; that he laid none of it on his bear land in spring; and that, in the 'last year of his lease, he had not altered the practice of former years. But the 'Court must have disbelieved this; for, according to the report of the decision, it ap-'pears that the grounds on which Mertonhall claimed the dung were, 1st, That 'Finnie ought to have laid all the dung collected between Martinmas and bear seed 'time on the bear land, which he had not done; 2d, That he was bound to labour the 'land the last year of his lease in the same way as in former years, which he had not 'done; 3d, That the farm was a steelbow farm, so far as respected the straw, and 'therefore the tenant was not entitled to the price of the dung made of that straw. 'It is clear that this last reason did not influence the Court; because they found him 'entitled to payment of the dung made after bear seed time, which was made of that 'straw, as well as the rest,—which they could not have done, if they had been moved 'by the straw being steelbow. They must, therefore, have been satisfied, that it was 'the custom to lay the dung on the land for bear, and that Finnie had deviated the 'last year of his lease from his mode of cultivation in the former years of his lease. 'But the Lord Ordinary will take it on himself, from personal knowledge, to affirm, 'that this is not the practice of the present day; and, consequently, although the dung 'may be ordered to be left on the farm of Dalcally, it will certainly not be on the 'ground, that, by the modern system of good husbandry, it ought to have been laid on 'the ground intended for bear or barley. With regard to Lord Kames's reason for 'the decision of Finnie, viz. that dung not being a proper subject for being sold for 'payment of rent, the proper use of it being to meliorate the land,—'ergo, if not 'used, it goes with the land to the new tenant,'—it is, with deference to that great 'man, fanciful, when he states it so broadly without qualification, and is actually con-'tradicted by the judgment itself, which allowed Finnie to be paid for the dung made 'after seed time, which, according to Lord Kames, ought to have been left to the new

say 'whether he sowed wheat in the first year of his entry to 'the farm of Daleally? whether, if he did sow any, he laid 'dung on the land for it? and whether he purchased that dung, 'and from whom?' A proof followed, establishing the affirmative; and that the purchase had been made from the outgoing tenant. The Lord Ordinary then, 'in respect of the reasons 'formerly given, and, in addition thereto, that if Berry shall 'not be paid for the dung left on his farm, his successor, the 'incoming tenant, will get a crop of wheat at Berry's expense,' adhered. To this interlocutor the Court adhered, but remitted to the Lord Ordinary to consider the principle on which the valuation was to be ascertained, and a claim of interest.* June 10. 1825.

Allen appealed; and Berry having died, his representatives were sisted in his place.

Appellant.—1. The judgments complained of are inconsistent with the stipulations of the lease. These entitle the appellant, without value, to the straw and manure arising from the tenant's crop, 1820. There is no question as to the straw of 1821. As to the straw of 1820, the tenant was bound to consume it, as well as the straw of all previous years, on the land; and if he did not so consume it, or could not, still he is

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'tenant. With regard to the other two cases appealed to, both occurring between the 'Earl of Wemyss and his tenants, the latter were bound, in both cases, to lay the 'whole dung on the land, which is not the case here; and the former of these cases 'seems to have occasioned difference of opinion. It was the fault of the tenants to 'make such a bargain; and, in doing so, the Lord Ordinary thinks, that if their farms 'produced wheat, they would have done an injury to their successors if they laid on 'the whole dung in spring. The Lord Ordinary desires it to be distinctly understood, 'that he does not mean to justify, nor ever will give his sanction to the plea of any 'tenant using pretexts to cover unfair conduct in withholding manure from his farm, 'in order to sell it. His reason in this case was, that there has been no accusation of 'mislabour, nor any allegation that the respondent (Berry) has cultivated his farm the last 'year of his lease in any way so as to withhold from it the manure it received in other 'years. The representer's plea is, that he should have laid dung in spring on the 'ground destined for oats, for barley or peas, although he never did so before; the 'consequence of which would have been, that the incoming tenant would have had no 'dung to put on his land sown with wheat in the autumn and winter of that year, and 'thereby must have either lost altogether a crop of wheat, or had a bad one. The 'Lord Ordinary must be allowed to think, that this is a mode of management which 'is neither desirable for landlord or tenant; and, if the respondent paid for dung to 'his wheat the first year of his entry, would be doing injustice to him.'

* 5. Shaw and Dunlop, No. 129. p. 212.

June 10. 1829. not entitled to its value, or to take it away: it remains the property of the landlord. The case is equally clear as to the manure. The only purpose and object of an obligation against the tenant to consume all the straw upon the ground, is to secure a supply of manure. The manure must follow the stipulation applicable to the straw. In point of fact, manure is but the straw in another shape; and if the manure be not laid on the land, the landlord's object would be defeated. The tenant, therefore, can neither take the manure away, nor require its value from the landlord or incoming tenant.

2. But, independent of contract, the appellant's claims as landlord are founded on the common law, and recognized by decisions almost applicable in terminis to the present case. Wherever a lease does not expressly regulate the rights and interests of parties in the manure that may remain upon the expiry of the lease, all the manure made prior to bear seed time must be consumed on the land that season, or remain for the landlord; and the tenant has only claim to the manure made after bear seed time. This is a safe and expedient rule; and even if inconveniences had attended it, as may happen with all general rules, it is wisdom to adhere to fixed principles. 'The tenant,' said the Court, (Finnie v. Trotter and Mitchell, January 27. 1767), 'shall receive no 'value for any manure which was upon his farm, but was not 'used, at his last spring seed time.' The tenant wished a new rule to be adopted; but the Court would not disturb existing practice. The doctrine, that the tenant is only bound to cultivate, and to apply the manure, tanquam bonus vir, would lead into endless inquiries in each individual case, and utterly destroy the salutary rule 'stare decisis.' The case of Finnie is not inapplicable because the straw was steelbow. In point of fact, it is very questionable if it was steelbow; and still more, if the Court were moved by that specialty, if true. But the qualification of steelbow cannot affect the question. The appellant admits the tenant's right to what manure was made after bear seed time; but it is only as to that, that steelbow can make any difference; for whether steelbow or not, the straw of all previous crops, and manure made each year before seed time, must be laid on the grounds. To contend that there has a new practice arisen in husbandry, and that the Dale-ally farm, from locality and nature, requires a different treatment, is an assumption which the appellant does not concede, and the tenant has not proven.

Respondent.—1. The manure of the preceding year was laid on the ground, for the seed crop to be reaped in autumn 1821; but the manure which accumulated after, was reserved, according to custom and good management, for the incoming tenant, with exception of what was necessarily used with the spring green sowings. To have cast all on the ground in spring, because the respondent's term of lease was expiring, would have been destructive to the crops, and ruinous to the incoming tenant, who had no means of procuring manure to lay down his wheat land with. As to the straw, the respondent was clearly entitled to what remained at Whitsunday, when he quitted the houses and grass, for it amounted to no more in quantity than what he could consume before he finally quitted the farm; and he was equally entitled to dispose of it to the incoming tenant. If it had been consumed, and converted into manure, it would, even by the appellant's admission, have belonged to the respondent. As to the manure, there is no stipulation that more than what was necessary, by the course of good husbandry, should be laid on the lands. On that principle the respondent acted; and that he was right, is proved by the clause in the Loan lease prohibiting him from doing what the appellant now most inconsistently requires, viz. laying down on the ground in spring the dung calculated for the wheat seed. June 10. 1829.

2. The only rule when the case is left to common law, which regulates questions of the present nature, is, that the tenant shall, tanquam bonus vir, duly cultivate the farm, according to the rules of good husbandry known and practised in that part of the country. He is not, therefore, entitled to adopt any mode of cultivation which will deteriorate the lands, or render them less valuable to the incoming tenant; nor can he alter the course of cultivation, where that alteration will prove prejudicial to those who follow. The case of Finnie *v.* Trotter and Mitchell was circumstantial, and not intended to lay down a general rule. It related to a farm situated on the high sterile range of the Pentland Hills, and contained the distinctive specialty, that the straw on the farm was steelbow. Certainly it affords no authority for the sweeping principle, that, in all cases, while the manure made after bear time belongs to the tenant, all the manure made before bear time belongs to the landlord. The aim of the appellant, in collusion with the incoming tenant, is nothing less than obliging the respondent to pay for manuring the ground, of which not the respondent, but the incoming tenant, is to reap the crop and benefit.

June 10. 1829. The House of Lords ordered and adjudged, that the interlocutors complained of be affirmed, with L. 100 costs.

LORD CHANCELLOR.—In the case of Allen v. Berry, some time since argued at your Lordships' Bar, it is my intention to move for your Lordships' judgment. Although not of much importance in point of amount, it is of considerable importance in point of principle, as it relates to the agriculture of Scotland.

Mr Allen was owner of certain lands in the parish of Errol. He granted a lease of those lands to James Berry, the respondent, for the term of nineteen years, to commence in the year 1802, at Whitsunday, as far as related to the house and the natural grasses; and from the severing of the crops, as far as related to the arable land. There are only two clauses in the lease to which it is necessary I should direct your Lordships' attention. They are in these terms:—(His Lordship then read the clauses already cited, ante, p. 417.)

The lease related to two farms, the one called Daleally, and another farm called the Loan farm; and the stipulations are such as I have stated, namely, that the tenant was not to be allowed to remove any part of the fodder from the Daleally farm, but was to consume the whole of it upon that farm, with the exception of hay, and the fodder that might be the produce of the way-going crop; that the lands were to be sufficiently cultivated and manured; and, with respect to the Loan farm, none of the manure which should be made after the wheat seed time of the preceding year was to be laid out or expended upon the farm in the spring, but the whole of it was to be kept for the proprietor, or the incoming tenant, at the expiration of the term.

I think that your Lordships are entitled, from a consideration of all the circumstances of this case, and the shape which the cause has taken from its outset, to assume, that this farm, independently of any question of law, was cultivated according to the due course of husbandry in that district. No dispute or doubt has been raised on that point. Offers of proof were made; and the parties were not called upon to prove that fact. Your Lordships are entitled, then, to hold that, independently of any positive rule or point of law, practically this farm was cultivated according to the rules of good husbandry in that district.

My Lords,—It appears to me, that during the nineteen years that the tenant, James Berry, possessed this farm, he pursued precisely the same course of cultivation which he adopted in the first year. He never laid, at the spring time, any manure upon the ground, except what was required for the green crops, but reserved the manure for the wheat crop; because in that district the wheat crop is the crop to which the tenant looks for the payment of his rent, and it cannot be raised in that district without the proper application of manure. This course was followed during the nineteen years he continued tenant of this farm, without any complaint or any remonstrance from his landlord; and it

appears that in this district, the Carse of Gowrie, this is the uniform system of cultivation among those persons who are most competent to the cultivation of land. It appears also, by referring to the lease, that as far as relates to the Loan farm, which is a farm of the same description, the landlord had expressly stipulated with his tenant, that no manure should be laid upon the farm in the spring, but that it should be reserved until the expiration of the term, in order that it might be handed over to the incoming tenant, to be employed for the wheat crop of the next season. We are therefore to take it, my Lords, upon the statement of the facts and circumstances, as a point in the cause, that, independently of any positive rule of law, the farm was well cultivated. June 10. 1828.

Now, my Lords, there are two questions that have been raised,—first, with respect to the straw; secondly, with respect to the manure. If any straw had remained at the expiration of the tenancy, which had been the produce of the crop of the preceding year, or any of the preceding years, it is perfectly clear that that straw would have become the property of the landlord, without his being required to make any payment,—not from any rule of husbandry,—but from the express stipulation of the lease; because it is expressly provided, and in distinct terms, that all the fodder, with the exception of hay, shall be consumed upon the ground; and if the tenant had neglected to consume any part of the fodder upon the ground, he could have no right afterwards to remove it, or to call upon the landlord to make a payment for that straw, which ought to have been so expended. He could not have profited in this respect from his own wrong. I am speaking of any straw that remained at the expiration of the tenancy. To what took place with respect to the straw, I shall again, by and bye, advert.

With respect to the manure, that is subject to a different consideration. There is no stipulation in the clause with respect to the manure. It is not required, in terms, that the manure shall be laid upon the land in the last year of the tenancy,—it is not required, in terms, that it shall be made use of for the spring seed,—that it should be laid on the bear land, to make use of a Scottish term as applicable to this subject. The only stipulation applicable to the manure is this: 'The tenant 'binds himself to cultivate, labour, and manure the land properly, and 'according to the rules of good husbandry.' There is no other stipulation with respect to the manure. But it is contended, in the first place, that, from the stipulation with respect to the straw, if the manure be not expended upon the land in the last year of the tenancy, it becomes the property of the landlord, because, it is said, the stipulation with respect to the straw or fodder (that it shall all be consumed upon the farm) is a stipulation for the benefit of the landlord; and as the landlord can only profit by that, by the circumstance of the fodder being consumed on the land, and converted into manure, that therefore it is clear that he is entitled to the manure without paying any thing for it. My Lords, I think that this consequence does not follow. This species of argument was adopted by one of the learned Judges

June 10. 1829. in the Court below; but I think that the inference does not follow. In this particular district, the Carse of Gowrie, if the manure were removed from the land, the consequence would be, that the succeeding tenant would not be able to raise a crop of wheat in the succeeding year; because it would be impossible, except at a most enormous price, to bring to the land sufficient manure for that purpose. If, therefore, it be a stipulation in the lease that the fodder shall be consumed upon the land, and if the landlord has an opportunity of purchasing that manure, he will from that circumstance derive a most important benefit; because by making that purchase he will be in a condition to raise a wheat crop in the succeeding year. It is not necessary, therefore, to infer from the stipulation with respect to the fodder, that the manure becomes the property of the landlord without payment. It is sufficient to say, that that stipulation is beneficial in another shape, namely, that the manure is ready produced, and that the landlord has an opportunity of taking it at a valuation. Therefore I think that no argument, or at least no satisfactory argument, can arise in consequence of the stipulation to which I have adverted, and which was insisted upon in the Court below, in respect of the regulation as to the fodder.

But, my Lords, it is said, that by the common law of Scotland, the manure which is provided between the wheat seed time and the bear seed time, must be laid upon the land at the bear seed time; and the case of Finnie v. Trotter, (which was relied upon in the Court below by one of the learned Judges, and was relied upon at your Lordships' bar), has been cited for the purpose of establishing that proposition. My Lords, I think that the case of Finnie against Trotter is by no means conclusive with respect to this point. I do not think that the argument built upon it applies to the present question. The farm was of a very different description. It was a farm called Swanston, in the neighbourhood of Edinburgh, upon the Pentland Hills, the nature of the soil of which is widely different from that of the Carse of Gowrie; and that which might be very good husbandry in the Carse of Gowrie, might be very bad husbandry in the Pentland Hills; and *vice versa*. It was observed by one of the learned Judges in the Court below, that in the case of Finnie v. Trotter, no offer was made to prove, in the proper stage, that the tenant had cultivated the farm in a course of good husbandry, but that he made that offer in a subsequent stage, and the landlord did not assent to that offer. It does not appear, therefore, that the course of treatment of the land, in that case, was according to good husbandry. And again, it was a steelbow farm, as far as related to the straw. The straw was therefore the property of the landlord; and if that straw were converted into manure, that manure would equally become the property of the landlord. You cannot, therefore, apply the case of Finnie v. Trotter, arising on a steelbow farm, to this which is not a steelbow farm, and where the straw is not the property of the landlord, but he has only a right to that which shall not be consumed upon the farm. The case of Finnie

against Trotter does not, therefore, appear to me to govern this decision; and I agree in the distinction taken by the learned Judges below, when that case was cited, and which has been since cited, and so much relied upon at your Lordships' bar. June 10. 1829.

But two other cases were referred to;—the Earl of Wemyss v. Wright, and Forrester v. Wright. My Lords, in my opinion they have no application whatever to the present question; because in the case of the Earl of Wemyss, there was a distinct and express stipulation, that the manure should be laid upon the ground. There was also a similar stipulation in effect in the case of Forrester; and therefore, whatever might be the rules of good husbandry, that question did not arise in either of these two cases, because the parties were bound by their express and positive stipulation. It appears to me, therefore, that there is nothing whatever to shew that there is throughout Scotland a universal rule, considered as the common law of Scotland, that, in all cases, the manure, which has been made subsequently to the period of wheat seed in autumn, is to be applied for the purpose of raising the spring crops; and I apprehend, that the law of Scotland must, according to all common sense, be in that respect like the law of England. The rule must differ, according to the particular district, and the nature of the soil; and all that could be required of the tenant is, that he should cultivate the grounds according to the rules of good husbandry,—that being regulated by the nature of the soil of which that farm consists.

Now, my Lords, the stipulation in the lease, as to the manure, was merely that the tenant should 'sufficiently cultivate, dung, labour, and 'manure the lands let to him, and not to cross-cut, or any way dete-'riorate the same, but, on the contrary, to use all proper means for 'meliorating and improving the said lands.' According to the evidence in the cause, it appears to me, that if he had laid the manure upon the land at bear seed time, he would not have cultivated his land according to a good course of husbandry, and that it was incumbent upon him to omit laying the manure upon the land at that time, in order that there might be a sufficient supply of manure for the purpose of raising a wheat crop the subsequent season. My Lords, I agree therefore with the majority of the learned Judges of the Court below, as to the principle on which they have decided this part of the case.

With respect to the straw, I stated to your Lordships that I would again advert to that. It was provided in the lease, that all the straw should be consumed upon the farm; and if any straw, therefore, had been left at the expiration of the lease, undoubtedly the tenant would not have been entitled to be paid for it. But, my Lords, the lease, as far as it regards the house and the natural grasses, terminated at Whitsunday;—as far as relates to the arable, it did not terminate until the severance of the crops. Before the termination of the lease, the landlord insisted upon taking possession of the manure and the straw; and he was allowed to take possession of the manure and the straw upon a

June 10. 1829. valuation being made, and upon a security being given. Now, the Sheriff has found, that there was no more straw upon the farm at that time than was requisite for the foddering of the cattle up to the period when the lease expired, on the severance of the crops. The tenant, therefore, was entitled to have retained possession of that straw for the purpose of foddering his cattle during the interval; and, according to what I have stated, if he had done so the manure would have been his property: it follows therefore, as a necessary consequence, that if the landlord chose to take possession of that straw at Whitsunday, and to convert it to his own use, he is bound to pay the value of it; and the Court below so thought. Upon both of these points, therefore, which have been considered as very important points by the learned Judges in the Court of Session, I must recommend to your Lordships to affirm the judgment of the Court of Session. I think that it is not at all inconsistent with any of the authorities which have been relied upon, and that it is a sound decision to which the Court came; and your Lordships will be more satisfied at arriving at this conclusion, when you are informed, that nineteen years ago, when this tenant took possession of this farm, he paid, as incoming tenant, to the outgoing tenant, for the value of the manure at that time on the premises. On these grounds I would recommend to your Lordships, that this judgment be affirmed, with L.100 costs.

Appellant's Authorities.—Duke of Roxburgh, 2. Bligh, p. 165.; Gordon, May 19. 1826, (2. Wilson and Shaw, p. 115.); Finnie, Jan. 27. 1767, (15,260.); Pringle, June 30. 1796, (6575.); Earl of Wemyss, June 16. 1801, (App. Tack, 7.); Forrester, Feb. 19. 1808, (App. Tack, 16.)

Respondent's Authorities.—1. Stair, 11. 4.; 2. Erak. 6. 12.; 3. Erak. 1. 16.; 1. Stair, 15. 6.; 2. Stair, 9. 31.; Haddo, Feb. 6. 1663, (7539.); 2. Bank. 9. 21.; 2. Erak. 6. 39.; Bell on Leases, 3d Edit. p. 258.

SPOTTISWOODE and ROBERTSON—MONCREIFF, WEBSTER, and THOMPSON,—Solicitors.

No. 29. COMMERCIAL BANKING COMPANY OF SCOTLAND, Appellants. *Sugden—Lushington.*

JOHN POLLOCK'S TRUSTEES, Respondents.—*Adam—Stevens.*

Mutual Contract—Master and Servant—Reparation.—Where it was stipulated in the contract of a Banking Company, that the manager should be removable by two-thirds of the joint committee of management;—Held, 1. (affirming the judgment of the Court of Session), That the Company were entitled, by a resolution of two-thirds of the Committee, to remove a manager who was named and appointed in the contract; and, 2. (reversing the judgment), That the Company were not bound to shew proper cause for having done so, or liable in damages if they could not do so.

June 12. 1829.

2D DIVISION.
Lord Pitmilly.

IN the year 1810, several persons resolved to establish a bank in Edinburgh by a joint stock subscription, under the firm of the Commercial Banking Company of Scotland. At this time John Pollock, (the constituent of the appellants), was a partner of Mr John Campbell, W. S. having been educated to the profession of the law. He was employed to prepare the articles and contract of copartnery, and a request was at the same time made, that he would take shares, and accept of the office of manager, and abandon his occupation as a writer. He agreed to do so; and the draft of a contract was prepared by him, in which it was required that the manager should hold at least forty shares of L.500 each, and by which he was nominated manager with a salary of L.1000 a-year; after which followed this clause: 'And as the said John 'Pollock has been invited to relinquish his professional connec- 'tion and prospects to accept of the said situation, he shall, in 'case of his removal or resignation, receive from the Company, 'during his lifetime, such annuity or annual allowance as the 'committee of management for the first year, or any succeeding 'years, shall fix by a minute in the sederunt-book; and when so 'fixed, the same shall be equally binding. And the said John 'Pollock shall not be removable from the said situation, unless the 'whole other members of the ordinary committee of management 'for the time being shall concur in a motion for his removal.' Several share-holders having objected to the contract, it was at first proposed to make certain alterations upon it; but it was thought better to make out a new one. In regard to this subject one of the partners, Mr Sandeman, wrote, that 'a new con- 'tract is certainly a radical cure for all irregularities and misun- 'derstandings, and, though troublesome, need not be very tedious. 'In a new contract, all the objectionable articles can be omitted, 'and the useful only retained.' A new deed was accordingly prepared and executed in place of the former, and in which Mr Pollock was named as manager; but it was declared, that on his removal, resignation, or death, all future managers should be named by the committee of management: 'And no manager 'shall be removable, unless two-third parts of the ordinary com- 'mittee of management for the time being shall concur in a mo- 'tion for his removal.' The provision of an annuity to Mr Pollock, in case of removal, was annulled.

He entered on the performance of his duty; but very soon he and the committee became dissatisfied with each other, and various proceedings, unnecessary to be noticed, took place, with

June 12. 1829. the view to his retirement by resignation. Having refused to resign, a meeting of the committee of management, on the 29th June 1812, removed him from the office, and appointed another in his place. Having declined to give up the keys, or obey the order, a petition, in name of the Bank, and several individual partners, was presented, on 9th July, to the Sheriff of the county of Edinburgh, praying for an interdict against him, and a warrant to take possession of the keys and documents. This petition was subscribed by all the members of the committee, with one exception; and these proceedings thereafter were approved of by a meeting of the proprietors, who declared, that from and after the 9th July 1812 Mr Pollock had ceased to be manager. An interim interdict was granted; and a counter petition was then presented by Pollock, for interdict against the appointment of a new manager; but in the meanwhile he gave up the keys. These processes having been conjoined, the Sheriff, on the 12th November 1812, continued the interdict against Pollock, and refused that which he had prayed for. He then brought the case into the Court of Session by advocation, and raised an action against the Company and the individual parties by whom he had been removed; and in which he concluded that it should be found and declared, 'that notwithstanding his unlawful suspen-'sion or removal therefrom, he has never ceased to have, and 'still has a just and lawful claim, right, and title, to the said 'office of manager for, and permanent director of the said Com-'mercial Banking Company of Scotland, and to the whole 'salary, benefits, and privileges of said office, as originally en-'joyed by him, which are already due and unpaid, or shall be-'come due during the joint endurance of his natural life and 'of the current contract of copartnery of said Company, or until 'he shall be lawfully removed by the said copartnery from his 'said office ob culpam, or for malversation in office. And the 'said Company, and the above named and designed members of 'their ordinary committee of management, personally, ought to 'be decerned and ordained, by decree foresaid, forthwith to 'restore and reinstate the pursuer in said office, and in the full 'exercise of all his former functions, powers, and faculties, and 'in the full possession and enjoyment of all his former salary, 'benefits and privileges, pertaining to his said offices of manager 'for, and permanent director of the said Company, as the same 'are constituted, appointed, and regulated by said articles of co-'partnership, and were originally possessed by him, both bygone, 'previous to, and since his said suspension or removal, and here-

'after to fall due during the period foresaid, in the same manner, 'and as fully and freely as if he had never been suspended 'or removed from said office; or at least the said Company, and 'whole partners thereof, jointly and severally, both as co-'partners and as individuals, and the above named and designed 'individual members of the said ordinary committee of manage-'ment, personally, and conjunctly and severally, ought and 'should be decerned and ordained to make payment to the 'pursuer of the annual sum of L.1000 sterling, as the stipulat-'ed salary attached and pertaining to the offices of manager and 'permanent director aforesaid, the duties of which he is ready 'and willing to discharge.' He also concluded for L.1000 of damages. Various pleas were stated in defence, but chiefly that the Bank had, by the terms of the contract, power to remove Pollock without any condition, except that two-thirds of the committee of management should concur in removing him; and that this condition had been observed. On the other hand, Pollock maintained, that, under the peculiar circumstances of his appointment, the Bank was not entitled, capriciously and without proper cause shewn, to remove him from his office; and he afterwards amended his libel, to the effect of alleging that his removal had been accomplished by an illegal conspiracy. The late Lord Meadowbank conjoined the advocation with the action; and 'being of opinion that the dismissal of the pursuer 'from the situation of manager has taken place and received the 'sanction of the defenders; and that, whether such dismissal pro-'ceeded on good grounds, or in a becoming manner or other-'wise, it cannot be objected to from any want of power in the 'defenders, because a sufficiency of power to dismiss such an 'officer, at pleasure, appears to be essential to such an esta-'blishment; but being also of opinion, that to turn off the pur-'suer from manager without premonition, and in the manner 'that is here admitted to have happened, must be justified by 'the resignation or other sufficient cause, or may entitle to 'some recompense or reparation;' his Lordship appointed the Bank, before answer, to give in a condescendence of what they would undertake to prove as 'a just and sufficient cause for the 'dismissal of the pursuer.'

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The case having afterwards come before Lord Pitmilly, he found, 'that the dismissal of the pursuer from the situation of 'manager of the Commercial Bank is sufficiently instructed, and 'cannot be objected to by the pursuer upon the ground of want 'of power in the defenders to dismiss or remove the manager of

June 12. 1829. 'the banking establishment: That the defenders having removed 'and dismissed the pursuer from his office against his consent, 'must, in the circumstances under which his appointment took 'place, and considering his situation previous thereto, be held 'liable to indemnify him for the loss sustained by his dismissal 'from office; unless it can be proved by the defenders that the 'pursuer was guilty of malversation in office; or that he con-'tumaciously refused obedience to warnings given him by the 'defenders, or their committee, and to regulations for his future 'conduct in his official department, plainly laid down for him; 'or had become unfit, subsequent to his appointment, for the 'discharge of his duties: but finds, that none of the articles in 'the defenders' condescendence, on this branch of the cause, are 'relevant, or ought to be allowed to go to proof, in respect that 'some of them assert an irregularity in the pursuer's attendance 'at the Bank, or allege his interference with the duties of other 'officers of the Bank, or his occasional neglect of his own duties, 'without alleging that these matters were made the subject of re-'monstrance with the pursuer, and of express regulation, and that 'precise rules were laid down, which would have been parti-'cularly necessary in the commencement and infancy of such an 'establishment; and in respect that others of the articles of the 'defenders' condescendence state objections to the pursuer's gene-'ral manner and conduct to customers and others, in the course 'of his management of the Bank concerns, which could not 'furnish just grounds for his removal by the defenders, who had 'chosen him for the management when in the knowledge of his 'general behaviour, and who do not allege that his conduct in 'these particulars had altered after his appointment, and who 'do not state the particular instances of misconduct to which 'they refer, but content themselves with allegations too vague 'and general to go to proof; and in respect that other parts 'of the defenders' averments consist of objections to the pur-'suer's conduct, which were discovered and known to the de-'fenders before his appointment of manager had been carried 'into effect, and that others of their statements are sufficiently 'explained by him in his answers; and that no part of the conde-'scendence on this branch is relevant, or ought to be allowed to 'go to proof, as affording grounds for the dismissal of the pursuer 'from office without recompense or indemnification; finds, there-'fore, that the pursuer is entitled to some recompense or repara-'tion from the defenders for the loss which he has suffered; and, 'before answer as to the amount thereof, ordains the pursuer to

'give in a condescendence, without argument, stating the amount 'of the sum demanded by him, and the grounds on which he pro- 'ceeds in fixing the amount.' And in reference to the said conspiracy, found 'that the pursuer has not condescended on any 'relevant matter, in support of his assertions that his removal 'from office was occasioned by a corrupt combination or con- 'spiracy among certain of the defenders to bring about this 'object.' At this stage of the case Pollock died, and his trustees, the appellants, were sisted in his place. Both parties having reclaimed, the Court in hoc statu recalled the interlocutor, and remitted to the Lord Ordinary to receive from the Bank a specific condescendence of the facts they averred and offered to prove, in justification of the removal of Mr Pollock from his office, with a view to a remit to the Jury Court. His Lordship having done so, and remitted the case to the Jury Court, that Court remitted it back to decide the question of relevancy; and having been reported on informations, the Court, on the 15th May 1822, found, 'that 'although the defenders, under the subsisting contract, possess 'power and authority to remove the manager from his office, 'which he did not hold for his life, yet, under the peculiar cir- 'cumstances attending his appointment, they were not justified 'in the exercise of that power without reasonable cause; and 'that it would be expedient to remit the whole process and pro- 'ductions to the Jury Court, in order that an issue or issues 'may be prepared and tried in terms of the statute.'

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Against this judgment the Bank appealed, so far as it found that they were bound to shew cause for the removal; and Pollock's trustees appealed, in so far as it found that the Bank had power to remove, and also in so far as his allegations relative to a conspiracy had not been admitted to proof.

The preliminary point as to parties (ante, page 365.) having been decided, the case came on for discussion on the merits.

Appellants, (the Bank).—The contract, as originally prepared, provided, that Pollock's annual salary, to whatever extent it might be raised, should at no time be less than L. 1000; and that, on his removal or resignation, he should continue to receive, during life, the same salary as if he had remained in office. But by the regulating contract it is expressly provided, that the salary shall be fixed by the committee of management; and no allowance is to follow removal or resignation. Again, by the former, Pollock was not to be removable, unless the whole members of the committee concurred in a motion to that effect. But

June 12. 1829. by the regulating contract, Pollock, like all future managers, was removable if two-thirds of the committee agreed in the measure. Pollock, by departing from the terms of the contract prepared by himself, betook himself to the provisions of the subsisting one. He might have stipulated for the continuance of the first, or for better, if he chose; but not having made these more favourable terms part of the subsisting contract, by which all are bound, he has only to blame himself if he is disappointed. There is therefore no doubt as to the power of the Company to dismiss Pollock. But it is said that there is a distinction between the power and the right to dismiss; and the Court below adopted this distinction. A new condition is thus introduced, which is unwarranted by the terms of the contract. The power there is not restricted by reasonable, or any other cause; and it is not the province of a Court of justice to rear up new and different conditions from those agreed upon by the parties. The remit, therefore, to the Jury Court, as far as this qualification was introduced, was objectionable. Pollock held either at the appellants' pleasure, or by the year. If the first, they could remove him when they chose. If by the year, he had no ground of complaint, as they allowed him his salary until the second year terminated. There was nothing in the circumstances attending Pollock's appointment, which could alter or affect the bargain concluded between him and the Company. The latter may, at the time, have valued his services highly; but the opening came no less opportunely to him. He knew for what equivalent he was embarking in a new profession, and must be presumed to have thought the terms satisfactory. To go now into a proof of the circumstances in which he was previously placed, or which attended his appointment, would be admitting a vague investigation, which, if it resolved into any thing, would substitute a contract from a medley of previous facts, in place of the actual contract which the parties finally agreed to by writing. What Pollock expected, or relied upon, can only be known to the Court through the terms of the existing executed contract. But if Pollock were removable at pleasure, then, clearly, no damages can be due for removing him. Had the act of dismissal been accompanied by any wanton insult or contumely towards him, that might have afforded ground for reparation. In that case the reparation would not have rested on the dismissal, but on the manner of the dismissal. There was, however, no harshness used by the appellants. As to the cross appeal, there is no need to go into it if a reversal follows the original appeal. If not,

the defence is, that the condescendence of the charges of combination and conspiracy, which Pollock's trustees seek to prove, is irrelevant. June 12. 1829.

Respondents, (Pollock's trustees).—Pollock, while enjoying the advantages of a lucrative and confidential situation, was induced, by the persuasion of the projectors of the Banking Company, to accept the office of manager. Looking to the prosperity he was enjoying, and the prospects he abandoned, and to the avowed high opinion entertained of him by the appellants, it is impossible that any of the parties could have contemplated that he was about to embark in a profession from which he might be driven in a moment, at the caprice and will of individuals over whom he retained no controul. Indeed, these very circumstances import a right to demand, and imply an agreement to give, an adequate consideration; and if he be removed, what more adequate consideration can be given than the damage he has sustained? But, in fact, Pollock's interests had been protected by the appellants in the first contract; and these stipulations never were intended to be infringed on or impaired by the terms of the second contract. This is a very special case; because Pollock was not merely manager,—he was the managing partner; and it formed one of the conditions of the contract that he should be so. The distinction between power and right is well known, and of every-day occurrence. A man may make a promise, and yet, without cause, may refuse to fulfil his engagement. He has the power to resile; but he must pay damages. In like manner, the appellants may have had power (supposing the second contract to be taken as the contractus regulans) to remove their manager; but if they had, by holding out views of permanent employment, induced him to sacrifice a lucrative profession, they must give, in the shape of damages, a remuneration equal to what the circumstances demand;—and that is precisely a question for a jury. As to the cross appeal, a relevant condescendence of facts has been made, sufficient to infer a corrupt combination or conspiracy to deprive Pollock of the office; and a proof of these allegations ought to have been allowed.

The House of Lords found, (in regard to the interlocutor of the 15th May 1822, complained of in the said original appeal), that the defenders had authority, at their discretion, to remove the manager from his office, and that they were justified in law in doing so; and it is therefore ordered and adjudged, that the

June 12. 1829. said interlocutor, in so far as it is consistent with these findings, be affirmed; and in so far as it is inconsistent with the same, be reversed. And it is further ordered, that the cause be remitted back to the Court of Session in Scotland, to proceed further therein as may be consistent with this judgment, and as may be just. And it is further ordered and adjudged, that the said cross appeal be dismissed this House, and that the interlocutors therein complained of be affirmed.

LORD CHANCELLOR.—My Lords, There was a case argued some time since at your Lordships' Bar, on appeal from the Court of Session in Scotland, between a person of the name of Pollock and a society that is well known by the name of the 'Commercial Bank of 'Scotland.' The facts of the case are shortly these:—In the year 1810 a number of persons associated themselves together, for the purpose of forming a Bank at Edinburgh; which Bank was distinguished by the name of the 'Commercial Bank of Scotland.' They applied to Mr Pollock, (who was at the time a writer to the signet, carrying on business in partnership with a person of the name of Campbell, as law-agents in Edinburgh), to assist them in forming this establishment, and to hold the office of manager when the establishment should be complete. Mr Pollock assented to the proposal. He acted in the formation of this Company; and a treaty was carried on for the purpose of ascertaining and fixing the nature of the office he was to hold in the establishment, and the amount and extent of remuneration he was to receive. A contract was finally entered into, which contract was drawn by Mr Pollock himself. That contract formed the articles of partnership which were intended to be entered into.

That part of the contract which related to Mr Pollock's situation, so far as it is necessary to be stated with reference to the present question, was in these terms:—[His Lordship then read the clause quoted *ante*, p. 431.]—That was the article contained in the original deed of partnership which was drawn up by him, or under his advice, and under his direction. That instrument, however, was not signed by all the partners; but Mr Campbell having been consulted, and his advice having been taken, many objections were made as to parts of this partnership deed; and in particular it appears, by a letter of Mr Sandeman's, stated in the appellants' case, that that part of it which related to Mr Pollock was a subject of consideration and discussion. Many alterations were proposed, and it was suggested by Mr Campbell, that those alterations should be made, and that a deed of ratification of the instrument so altered should be signed by the persons who had already executed the original instrument; and that the instrument so altered should be signed by the rest of the parties. That plan was, however, ultimately abandoned; and instead

of it a new partnership deed was executed, containing the alterations which were intended to be introduced. June 12. 1829.

That part of the new partnership deed which relates to Mr Pollock's situation and remuneration, is in these terms:—'The manager must 'be possessed of at least forty shares of the capital stock of the Com- 'pany, and shall receive such yearly salary or allowance from the 'Company as shall be fixed and regulated by the committee of 'management for the time being; and the said John Pollock is hereby 'appointed first manager. That on the removal, or resignation, or 'death of the said John Pollock, all future managers shall be nomi- 'nated and appointed by the ordinary committee of management for 'the time being;' and then a stipulation is made as to the amount of shares that any future manager is to hold. It then goes on thus:— 'And no manager shall be removable, unless two-third parts of the 'ordinary committee of management for the time shall concur in a 'motion for his removal.' This was the contract of partnership, which was completed and executed by all the partners, and among the rest by Mr Pollock, the manager.

Mr Pollock, in pursuance of this agreement, entered into the discharge of the duties of his office, and continued for some time to perform them. The committee of management, however, were not satisfied entirely with his conduct, and, after some difference between them, the committee of management at length removed him. There is no doubt that he was removed with the concurrence of two-thirds of the committee of management; and this was approved of by the proprietors in general.

Mr Pollock contends, in the first place, that they had no power or authority to remove him; and, in the next place, that, if they did remove him, they were bound to make him compensation for the loss and injury which he thereby sustained. Now it is quite obvious that this must depend upon the terms of the contract. He was the servant of the Company, and in order to ascertain whether or not he was liable to be removed by the Company, and if so, under what circumstances, and upon what terms, we must refer to the contract.

It appears to me absolutely impossible for a moment to assert, that the Company had not a right to remove him; because, even in the first contract, to which I have adverted, and which was drawn by Mr Pollock himself, it is expressly provided, 'That the said John Pollock 'shall not be removable from the said situation, unless the whole other 'members of the ordinary committee of management for the time 'being shall concur in a motion for his removal.' He was therefore removable under the first contract, provided all the members of the committee of management concurred in the propriety of his removal. Under the second contract, so far as related to his removal, the only alteration that was introduced was this,—'And no manager shall be 'removable unless two-third parts of the ordinary committee of 'management for the time being shall concur in a motion for his

June 12. 1829. 'removal.' So that under the first contract he was liable to be removed with the unanimous concurrence of the committee of management: Under the second contract he was liable to be removed if two-thirds of the committee of management concurred in his removal. It appears to me, therefore, impossible to contend for a moment that he was not liable to be removed. The Court below decided clearly that he was liable to be removed.

The next question is, whether he is entitled to any compensation in consequence of his having been removed? That must depend upon the terms of the contract. I do not find in the contract any definite stipulation in this respect, except what is contained in the article of the original deed of contract. There I find, that 'in case of his removal 'or resignation, he shall receive from the Company, for his lifetime, 'such annuity or pecuniary annual allowance as the committee of 'management for the first year, or any succeeding year, shall fix by a 'minute in their sederunt-book.' This was an article prepared by Mr Pollock himself, who was at that time acting as the adviser of the Company, who assisted in forming these articles of partnership; and undoubtedly, if they had continued to be the subsisting contract between these parties, Mr Pollock would have been entitled, in the event of his being removed from the office, to call upon the committee of management to hold a meeting for the purpose of fixing the amount of the remuneration he was to receive in the shape of retiring provision; but that contract was entirely done away with in consequence of the subsequent contract to which I have referred.

I have already stated, that it appears, by a letter of Mr Sandeman's, contained in the case of the appellant, that the situation and circumstances of the office held by Mr Pollock were a subject of consideration at the time when objections were made to the original contract;—a new contract was formed, and in the article relating to Mr Pollock, where it is stated no manager shall be removed unless two-third parts of the ordinary committee of management for the time being shall concur in the measure of his removal, I find no stipulation whatever,—no clause whatever,—entitling Mr Pollock to the benefit of any compensation, or any retiring provision, in the event of his being removed. I find, therefore, no subsisting contract which entitles Mr Pollock to a compensation. In the absence of any subsisting contract, it appears to me that he can have no claim in point of law to any compensation, if he is removed by the committee of management.

Taking, then, the whole of these circumstances together, and considering what the nature of the contract was between these parties, it appears to me clear that the committee of management had an absolute discretion to remove Mr Pollock when they thought proper,—that they were not responsible for the manner in which they exercised that discretion,—and that they were not bound to make any compensation or remuneration to Mr Pollock for the loss he sustained in consequence of that removal. Mr Pollock appears to have placed himself at their

discretion. He had this security, and it was his only security, that having been once appointed to that office, he could not be removed from it unless two-thirds of the committee of management concurred in the propriety of his removal. If two-thirds of the committee of management did concur in the propriety of his removal, it appears to me that he was validly, in point of law, legally and effectually removed from the office, and that he has no claim for compensation. June 12. 1829.

It is the more important to advert to what appears upon the articles of partnership, from the consideration that this was a company the shares of which were assignable, and any person purchasing a share would look at the articles of partnership, for the purpose of knowing in what situation he stood, and what were his obligations; and therefore it was natural to expect, indeed it was proper, for the purpose of guarding against imposition and fraud, that the precise terms of the stipulation should appear on the partnership deed, and such appears to have been the understanding between these parties.

I am of opinion, therefore, that the judgment of the Court below was correct, as far as relates to the decision that this gentleman, Mr Pollock, was removable at the discretion of two-thirds of the committee of management; but I think that they went too far in stating, that it was their opinion that Mr Pollock was entitled to compensation in the event of his removal. I am therefore of opinion, as far as relates to the former part of the judgment, that it should be affirmed, and that it should be reversed as far as relates to the latter.

With regard to the cross appeal in this case, Lord Pitmilly was of opinion that there was not sufficient ground to sustain the charge, or to make out a prima facie case. With respect to the charge, as far as related to a supposed conspiracy, I have looked through the papers, and I am quite satisfied that there is no sufficient ground to make out that charge, which relates to the merits of the cross appeal; and that decides the whole case.

MONCREIFF, WEBSTER, and THOMPSON—RICHARDSON and CONNELL,—Solicitors.

JAMES CAMPBELL of Kilberry, and Others, Appellants. *Lushington—Hunter.* No. 30.

DONALD BROWN, Respondent.—*Spankie—Napier.*

Jurisdiction—Statute.—Held, (affirming the judgment of the Court of Session),—1. That the Court of Session have jurisdiction to review, and set aside, the proceedings of a presbytery, under the 43. Geo. II. c. 54. where these proceedings have been irregular and informal. 2. That the omission to take in writing the evidence led before the Presbytery, is an informality inconsistent with the enactment of the statute, and open to correction by the Court of Session.

June 12. 1829.

1st Division.
Lord Alloway.

THE heritors of the parish of Kilberry, conceiving that they had ground of complaint against Donald Brown, schoolmaster of the parish, presented a complaint against him to the Moderator and members of the Presbytery of Kintyre, charging him with habitual neglect of duty, and other misconduct as schoolmaster. A full copy of the libel was served upon Brown, who thereon appeared in Court, and lodged his answers, denying the subject-matter of the complaint. The Presbytery having considered the libel and answers, found the libel relevant, and proceeded to examine witnesses in support of the complaint and of the defence. After the witnesses had been examined and cross-examined, and both parties heard on the evidence adduced, the Presbytery 'found certain articles of the said libel sufficiently proven by the 'oath of several witnesses, lawfully summoned, solemnly sworn, 'purged of malice, and interrogated thereupon: That the said 'Donald Brown has been found * guilty of habitual neglect of 'duty by engaging in other occupations,' and so forth. 'There-'fore the said Presbytery did unanimously depose the said 'Donald Brown from the office of parochial schoolmaster in the 'parish of Kilberry, prohibiting and discharging him from exer-'cising the same, or any part thereof, in all time coming; and 'declaring, that his right to all the emoluments and accommoda-'tions of the said office shall cease from this period; and the said 'school is hereby declared vacant.' The evidence taken on this occasion was not committed to writing, and consequently there existed no record, authenticated or unauthenticated, of the depositions of the witnesses adduced.

Brown, dissatisfied with these proceedings, and considering them null and void through informality, charged the heritors for one year's salary subsequent to the date of the deposition. Being met with a suspension, he brought a reduction of the Presbytery's sentence, on various grounds; but particularly, that there was no record of the evidence led. In defence, the Presbytery pleaded, that the reduction was incompetent by the 43. Geo. III. c. 54.† which declared that the Presbytery's judgment shall

* Means 'proved.'

† This Act, entitled 'An Act for making better provision for the parochial school-'masters, and for making further regulations for the better government of the parish 'schools of Scotland,' contains, inter alia, the following clause, § 21.: 'And be it 'enacted, that when any complaint from the heritors, minister, or elders, against the 'schoolmaster, charging him with neglect of duty, either from engaging in other occu-'pations, or from any other cause, or with immoral conduct, or cruel and improper

be final, without appeal to, or review by, any Court, civil or ecclesiastical. To this it was answered, that the Court of Session have a jus supereminens entitling them to review when there has been informality in the proceedings. June 12. 1809.

The Lord Ordinary found, that 'although by the statute 43. 'Geo. III. c. 54. § 21. the judgment of the Presbytery is declar-'ed to be final, without appeal to or review by any Court, civil 'or ecclesiastical; yet, if the proceedings upon which judgment 'was pronounced were contrary to law, or if that Court exceed-'ed the powers committed to it by the statute, they may be re-'viewed and set aside in this Court;—that it is required by the 'statute that the Presbytery take the necessary proof;—that it was 'necessary, according to the forms of the proceedings in Church 'Courts, that the proof should be taken upon oath;—that it is 'admitted by both parties that the proof was taken upon oath;— 'that any proof taken upon oath must be authenticated by the 'subscriptions of the witnesses, if they be able to subscribe, and 'by the subscription of the moderator;—and that the defenders 'have founded upon no statute by which this rule of law can 'be dispensed with in the proceedings of a Presbytery; and there 'is no such dispensing power in the statute in question. On 'the contrary, the statute expressly reserves the former rules of 'procedure, in so far as not expressly authorized to be departed 'from by that Act. Therefore, as the depositions of the wit-'nesses were not taken down in writing, nor duly authenticated, 'and the extract of the proceedings of the Presbytery produced 'is totally deficient in these respects, reduced and decerned in 'terms of the libel.'

From the shape of the process, the reductive decerniture was

'treatment of the scholars under his charge, shall be presented to the presbytery, they 'shall forthwith take cognizance of the same; serve him with a libel, if the articles 'alleged appear to them to be of a nature to require it; and, having taken the neces-'sary proof, they shall acquit or pass sentence of censure, suspension, or deprivation, 'as shall appear to them proper upon the result of such investigation; which judgment 'shall be final, without appeal to or review by any Court, civil or ecclesiastical: and in 'case they shall depose the incumbent from the office of schoolmaster, his right to the 'emoluments and accommodations of the same shall cease from the time of his deposi-'tion; and in case he shall fail or refuse to remove from the school, school-house, and 'garden, within the space of three months from the date of such sentence of deposi-'tion, the sheriff of the shire, or stewart of the stewartry, upon having an exact or 'certified copy of the sentence of deposition by the presbytery laid before him, shall 'forthwith grant letters of ejection against such schoolmaster, of which no bill of sus-'pension or advocation, nor action of reduction, shall be competent; and in case of 'such deposition, the school shall immediately be declared vacant, and the election of 'another schoolmaster shall take place.'

June 12. 1829. premature; the question before the Lord Ordinary merely being that of competency. But after some farther necessary procedure the Inner-House reduced and decerned, with expenses; and in the suspension found the letters orderly proceeded, with expenses.*

The heritors appealed.

Appellants.—1. The civil Courts never had power to review in matters purely ecclesiastical. Review is competent only to the superior ecclesiastical Court. But the evils of protracted litigation having become intolerable, and the Legislature being anxious to make better provision for the parochial schoolmasters, and for making farther regulations for the better government of the parish schools in Scotland, the statute 43. Geo. III. c. 54. declared the judgment of the Presbytery to be absolute, and incapable of appeal. There is no exception of any jus supereminens of the Court of Session. If such a corrective power vested any where, it would be in the superior ecclesiastical Court; for it was the latter that formerly had the appellate jurisdiction: the civil Court never had in matters ecclesiastical, and it would be extraordinary, on mere implication, to give it now.

2. There was no deviation from the statute; and therefore no occasion for the exertion of the jus supereminens. A proof was taken upon oath. The Court satisfied their minds, so as to enable them to decide upon the merits of the complaint and the defence; and they acted accordingly. The statute requires no more. It contains no injunction that the proof should be in writing; but, cutting off the power to appeal, made the reducing the proof to writing superfluous. There was no longer a Court of review to which the record could be carried. The Presbytery may be compared to a jury, whose verdict cannot be challenged; and the evidence led before which is therefore not made matter of written record.

Respondent.—There are two questions here, the competency of the Court of Session to entertain the appeal, and the legality of the proceedings of the Court sought to be reviewed.

1. It is admitted, that the power of review *on the merits* is taken away from Courts ecclesiastical and civil. But the statute does not also exclude all relief, if the Presbytery have proceeded

* 3. and 4. Shaw and Dunlop, Nos. 337. and 150.

erroneously in the *forms* or preparatory orders whereby they reach their final judgment. The statute contemplates an exact observance of form in the procedure; and these forms, notwithstanding that the appeal be cut off as to the merits, must be scrupulously adhered to. The absence of the right of appeal on the merits, makes it the more essential that no looseness should be allowed to creep into the preparative procedure. But the greatest injustice would be worked if there was no remedy in a case like the present, or where there had been an excess of power. In such a case, the jus supereminens of the Court of Session interposes, in the same way that it keeps other inferior tribunals (from which there may be no appeal on the merits) pure and regular in the course of procedure. No Church Court has the jus supereminens which could give the relief here required, which is merely protecting the rules of the civil procedure whereby the judgment is reached. That involves no ecclesiastical question; and the less pretence have the superior Church Court to this power of administering a corrective, seeing that, in the present instance, the Presbytery may be fairly considered as acting entirely ministerially vi statuti, and not in virtue of any powers inherent in them as a mere Church Court. June 12, 1829.

2. Holding that the Court of Session possess the jus supereminens, there can be no doubt of the departure from all wholesome form exhibited by the proceedings. Where a party seeks redress from the Presbytery, he must proceed regularly by libel, and take the necessary proof. The excuse, that serving with a libel is a mere matter of discretion, and that 'taking necessary proof' merely means such parole testimony as may answer the purposes of the moment, is in opposition to the intendment of the statute, and adverse to all the recognized proceedings of the Church, or any other Court possessing such important jurisdiction. By enactments, both of the Legislature and of the Church,—by practice, civil, criminal, and ecclesiastical,—an authentic record of the proof led is essential in all Courts not exempted by express Act of Parliament; and this rule does not depend on the necessity of having a record to take up to the Court of appeal. There are many equally cogent reasons why parole evidence should be taken in writing. It induces caution and regularity, and is at once a check upon the Judge, and the security of the party.

The House of Lords ordered and adjudged, that the Interlocutors complained of be affirmed.

June 12. 1829. LORD CHANCELLOR.—My Lords, There was a case argued some time since, in which John Campbell, Esq. of Kilberry, and others, heritors of the parish of Kilberry in the county of Argyll, were appellants, and Donald Brown, schoolmaster of the same parish, was respondent. This, my Lords, was the case of an appeal from a decision of the First Division of the Court of Session. It appears that the respondent, in 1806, was appointed schoolmaster to the parish of Kilberry, and that he continued to occupy that office till the year 1820. The heritors of the parish of Kilberry thought that they had some reason to complain of the conduct of the respondent, and accordingly they instituted proceedings before the Moderator and Presbytery of Kintyre, alleging certain complaints against the respondent. A regular libel was served upon him. The cause came on for trial; and the result of the trial was, that the Court pronounced a sentence of deposition against the respondent. It appears, and is not disputed, that in the course of these proceedings no written evidence was taken; and in consequence of that defect, or that supposed defect, in the proceedings of the Court, a process of reduction was instituted in the Court of Session, for the purpose of setting aside the proceedings.

Now, my Lords, there can be no doubt whatever, that, previous to the Act of the 43. of Geo. III., the proceedings in the Court of the Presbytery, if irregular, would have afforded a ground of an appeal. The appeal would have lain to the church Courts; and if it had turned out that no written evidence was taken for the purpose of supporting the charge, there can be no doubt that upon such appeal the judgment would have been reversed; and one question, and one important question is, whether any alteration in this respect has been introduced by the operation of this statute of the 43. of Geo. III.? By that Act, in proceedings of this description, the appeal to any Court, civil or ecclesiastical, is taken away, and the judgment of the Presbytery is declared to be final. But the question remains, whether, under such circumstances, if the Presbytery pursue a course different from that which they ought to have pursued, and would have been bound to pursue, before the Act of the 43. of Geo. III., they are to be considered as proceeding irregularly; and whether, if they so proceed in a point that is essential, there is not a mode of setting aside those proceedings?

I think, my Lords, that it is perfectly clear, that no alteration whatever in the course of proceedings was intended to be introduced by the Legislature, when the statute of 43. Geo. III. was passed. The only object of that statute was to take away the successive appeals to the the different church Courts, and to declare, that the decision of the first tribunal, the decision of the Moderator and Presbytery, should be final. It did not intend, as I apprehend, to make any alteration. If that be so, then it is equally necessary now, as it was before the 43. of Geo. III., that the Court should proceed on written evidence. It is argued, that it is unnecessary to take the evidence in writing, the

appeal being taken away; and that the object of having the written evidence was, that the appellate tribunal might have a correct document to which it might refer, for the purpose of seeing whether the evidence supported the charge. But, my Lords, there are other advantages requiring the evidence to be taken in writing. The necessity of its being taken in writing produces much more deliberation,—produces also a much greater degree of responsibility in the parties by whom the judgment is pronounced,—and renders them much more cautious with respect to the course they are pursuing. When the appeal is taken away, it appears to me, (and in that I concur with the Judges of the Court below), that it is still more important that this particular provision should be adhered to. I think therefore, my Lords, that it is now as necessary as it was before the passing of the statute, that the evidence should be taken in writing. June 12, 1829.

But, my Lords, reference was made to the language of that Act, and it will be proper that I should read the clause upon which the argument has been built. The Act is entitled, 'an Act for making better pro-'vision for the parochial schools in Scotland.' It enacts, 'that when 'any complaint from the heritors, minister, or elders, against the 'schoolmaster, charging him with neglect of duty, either from en-'gaging in other occupations, or from any other cause, or immoral con-'duct, or cruel and improper treatment of the scholars under his 'charge, shall be presented to the Presbytery, they shall forthwith take 'cognizance of the same, serve him with a libel of the articles alleged 'to appear to them to be of a nature to require it; and having taken 'the necessary proof, they shall acquit or pass censure, suspension or 'deprivation, as shall appear to them proper upon the result of such 'investigation; which judgment shall be final, without appeal to, or re-'view by any Court, civil or ecclesiastical.' Now, my Lords, I think, not merely with reference to the general spirit and scope of this statute, but referring to the very letter and terms of it, it is quite obvious that the Legislature did not intend to introduce any alteration with respect to the course of proceeding. In the first place, it is stated, that when a charge against a party is preferred to the Presbytery, they shall serve him with a libel, if the articles alleged appear to them to be of a nature to require it; they must proceed therefore by way of libel, serving the party with a libel. It was argued indeed from those words, 'if 'the articles alleged appear to them to be of a nature to require it,' that it was left to the discretion of the Court whether or not the libel should be served; but I do not consider that as a correct interpretation of the Act, but that if the charge be of such a nature as to lead the Court to think it ought to be proceeded in, in that case a libel should be served; and that if there are any proceedings whatever leading to a censure, leading to a deprivation, or leading to any other ecclesiastical sentence, in that case the party himself must be served with a libel.

The Act then goes on to state, 'and having taken the necessary 'proof;' it does not say, having heard the evidence, but having taken

June 12. 1829.

the necessary proof; the very phraseology appears to be made use of as applicable to the course of proceedings which has been previously in use in the Court of Presbytery, namely, taking the evidence in that Court in the ordinary way before those tribunals in writing. It does not appear to me, therefore, that there is any thing either in the object of the Act,—the language of the Act,—or in any circumstances connected with this cause, which leads to the conclusion, that the Legislature intended that any alteration should take place, in respect of the mode of proceeding before tribunals of this description.

The remaining question, then, for your Lordships' consideration will be this; viz. whether, the Court having proceeded in such a way as would have subjected their decision to an appeal to the church Courts, before the Act of the 48. Geo. III.,—whether, that appeal being now taken away, and the judgment declared to be final,—there is no mode whatever of interposing in a case of this nature, for the purpose of correcting the course of their proceedings? It is said, that there never was an appeal from the decision of the Court of Presbytery to the Court of Session, and that therefore it would be extraordinary, if, the appeal having been taken away from the church Courts in a case of this description, you should give jurisdiction and authority to the Court of Session, which Court had no jurisdiction before that statute. But I apprehend, that (particularly from the circumstance of the appeal being taken away) a jurisdiction is given in this case to the Court of Session, not to review the judgment on the merits, but to take care that the Court of Presbytery shall keep within the line of its duty, and conform to the provisions of the Act of Parliament. There is in the Court of Session in Scotland, that superintending authority over inferior jurisdictions, which is requisite in all countries, for the purpose of confining those inferior jurisdictions within the bounds of their duty; and the only question here is, whether this case is of such a nature and description as to justify the calling into action that authority of the Superior Court? Cases were cited at the Bar, and mentioned in the printed papers now on your Lordships' table, in which the Court of Session has exercised a superintending authority over inferior jurisdictions, when they have been guilty of an excess of their jurisdiction, or have acted inconsistently with the authority with which they were invested. Now, in this particular case, the power of final judgment is given to the Presbytery, under certain limitations and certain restrictions. The party is to be served with the libel,—the necessary proof is to be taken,—and unless the inferior tribunal pursue the course pointed out by the Act of Parliament, they have no authority to proceed to judgment; and if, without pursuing the course pointed out, they do proceed to a judgment, in that case all their proceedings will be so inconsistent with the authority with which they are invested, that the superintending authority of the Court of Session may be interposed, for the purpose of setting aside those proceedings. My Lords, it is upon these grounds that I think the Court of Session, in the present case,

was justified in what they did. The case came on, in the first instance, before the Lord Ordinary; and he pronounced a judgment, reducing the judgment in the proceedings before the Presbytery. The case came on afterwards on two successive hearings before the Lord Ordinary; and he adhered to his former judgment. It afterwards came on before the Court of Session; and the Court of Session were of opinion, that it was a case that called for the interposition of their authority for the purpose of setting aside the proceedings; it appearing to them to be inconsistent with the provisions of the Act of Parliament, which gave a jurisdiction and authority to the Presbytery to pronounce a final judgment. Under these circumstances, my Lords, I humbly submit to your Lordships the propriety of confirming the judgment of the Court below. In this case I should not recommend to your Lordships to give costs. June 12. 1829.

Appellants' Authorities.—Act of Convention, 1560; Statutes, 1567, c. 11.; 1581, c. 1.; 1592, c. 16.; 1690, c. 5.; 1707, c. 6.; Acts of Assembly, 1565, 1567, 1638, 1642; Book of the Kirk, 1567, p. 31.; Book of Policy, 1578, c. 9. § 10.; Spottiswoode, p. 164. 297.; Kames, Stat. Law, App. No. 3.; 1633, c. 5.; 1662, c. 4.; 1693, c. 22.; 1. Ersk. 5. 24.; 1. Pardovan's Coll. 5.; M'Culloch, Dec. 26. 1793, (7471.); Acts of Assembly, June 3. 1799, May 28. 1809; Deer, May 24. 1813, (in General Assembly); Hume, p. 42.; Robertson, Aug. 11. 1780, (7465.); M'Queen, July 25. 1781, (7466. and 7469.); Corstorphine, March 10. 1812, (F. C.); Dumfries, July 7. 1818, (F. C.); Moodie, May 18. 1819, (F. C.); Rutherford, Nov. 17. 1785, (7469.); Allardice, Feb. 18. 1809, (F. C.); Milne, June 28. 1814, (F. C.); Chivas, July 11. 1804, (No. 12. App. voce Jurisdiction); 2. Hume, p. 368.; M'Kenzie's Crim. voce Privy Council, § 6. p. 191.; Maclaurin's Crim. p. 28. and 586.

Respondent's Authorities.—Young, June 28. 1814, (F. C.); 1686, c. 18.; Dickson, Feb. 6. 1768, (7464.); Pardov. c. 2. and 4. § 14.; Act of Ass. April 18. 1807; Robb, Nov. 19. 1824, (3. Shaw and Dunlop, No. 218.); Corstorphine, March 10. 1812, (F. C.); Russell, Jan. 18. 1764, (7353.); Loudon, May 18. 1793, (7398.); King, July 9. 1515, (7318.)

MONCREIFF, WEBSTER, and THOMPSON—RICHARDSON and CONNELL,—Solicitors.

WILLIAM BENNET, (Trustee for the Creditors of JOHN CRAWFORD and Company), Appellant.—*Adam—Ivory—Keay.* No. 31.

ROBERT M'LACHLAN, (Assignee in trust for the Creditors of JOHN CRAWFORD), Respondent.—*Sol. Gen. (Tindal)—Brown.*

Bankrupt—Stat. 1661, c. 21.—54. Geo. IV. c. 137.—Held, (affirming the judgment of the Court of Session), that a general adjudication under the Bankrupt Statute, of the estates of an heir in favour of the trustee on his sequestrated estate, within three

years from the death of the ancestor, constitutes complete diligence in favour of the creditors of the ancestor, so as to give them a preference over his estates, without the necessity of leading separate adjudications.

June 15. 1829.

1st Division. Lord Eldin.

For several years prior to 1811, John Crawford of Broadfield carried on business at Port-Glasgow, under the firm of John Crawford and Company, along with three of his sons, James (the eldest), Andrew, and Joseph. He retired on the 28th of February of that year, but without formal notice or advertisement. The business continued to be carried on by his three sons, under the same firm. Mr Crawford died on the 3d August 1813, leaving both heritable and moveable property, estimated at upwards of L. 100,000. He left personal debts to the amount of L. 25,000. By a deed of settlement he conveyed his whole property to his widow and his three sons, James, Andrew, and Joseph, in trust, for payment of his debts, and distribution of the residue among the family. James, as the eldest son, made up titles to, and was infeft in a large portion of the heritable property, and remained in apparency as to the rest. The moveable funds were realized by him and the other trustees; but it was alleged, that scarcely any part of the debts were paid, the money being employed in the commercial operations of the Company. Early in 1816 the Company became bankrupt; and on the 19th February of that year a sequestration of the estates of the Company, and of James Crawford as an individual, was awarded by the Court of Session; and thereafter of the estates of the two other partners, Andrew and Joseph. This sequestration was granted on the application of the parties themselves, with concurrence of a creditor whose debt had been contracted subsequent to the death of the father. On the 5th of March 1816, the appellant, Bennet, having been elected trustee, was confirmed in that office by the Court of Session, and the usual general decree of adjudication pronounced.

The original debts of the father remaining unpaid, and his estate having become liable for about L. 20,000 more, in consequence of no notice of his retirement having been given prior to his death, his creditors proceeded to take measures for attaching his separate estate; and the respondent, and others, (for whom he now acted as trustee), in that character raised actions and got decrees of constitution, reserving all objections contra executionem, between the 22d of March and 11th June 1816. The trustee was not called to any of these actions. On the 20th April he obtained a special adjudication of nearly all the property in which James Crawford had been infeft. In the meanwhile the creditors had raised actions of adjudication,—some of them in the

Court of Session, and others in the Sheriff Court,—(against the progress of which they alleged the trustee threw obstructions); but they, in one of them, obtained in the Court of Session decree on the 3d July, which was recorded, and a charge given to superiors on the 2d of August 1816. The three years from the death of the father expired on the following day. On the 20th December of the same year, and 3d March 1818, the trustee obtained special adjudication of the remaining part of the heritable estate. June 15. 1829.

Among other subjects in which the father had died infeft, was an heritable bond of L. 6000 over the estate of Blair. Both parties adjudged it, and the debtor thereupon brought a multiplepoinding;—the respondent, on behalf of himself and other creditors, claiming to be preferred under the statute 1661, in virtue of the diligence done by them; and the trustee, on the footing that that diligence was inept, and that he had right under the sequestration.*

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* The following is the statement of the case given by the trustee in his appeal case, p. 4.—'The appellant, in supporting his claim to the debt, maintained, That, subsequent to the sequestration of James Crawford, the son, any adjudication at the instance of the respondents, as creditors of the father, was totally inept; that it might be possible for the respondents, if they could show that they had really secured a preference over the proper creditors of the son, under the statute 1661, c. 24., to plead their right to that preference in ranking under the sequestration; but that they could, on no account, create a separation in the property of the subjects, as they had stood in the person of the bankrupt at the date of sequestration; and that the whole must be carried by, and administered under, the adjudication of the appellant, in his character of trustee, subject only to such claims of preference as might be substantiated by the various classes of creditors, whether of the father or of the son. On the other hand, it was contended by the respondent, That the effect of the Act 1661 was, within the three years, to create an entire separation between the estate of the ancestor and that of the heir; that the creditors of the ancestor were therefore entitled to attach it, notwithstanding the sequestration of the heir; that, in order to secure their preference under the statute, it was indispensable that they should do complete diligence against the ancestor's estate; that the prohibition contained in the bankrupt statute, (sect. 42.) of all adjudications other than the adjudication by the trustee, applied only to the peculiar estate of the bankrupt heir, as contradistinguished from that separate estate which had belonged to the ancestor, and which remained within the three years exclusively subject to the diligence of the ancestor's own creditors, and, as in a competition with them, altogether uncarried by the sequestration; that the appellant's adjudication, qua trustee of the bankrupt heir, only attached any reversion which might remain over, after satisfying the primary diligence of the ancestor's creditors; that so far was the appellant from being entitled to administer the subject in competition, as carried by his adjudication, and as being subject only to a preference in favour of the ancestor's creditors, that the property was to all intents and purposes carried by the diligence of the latter as their own absolute subject; and that, therefore, it being totally insufficient to satisfy their debts, so that no reversion could be left, they were entitled to be preferred in the competition simpliciter. This argument prevailed, and

June 15. 1829.

The Court having preferred the respondent, a private arrangement was made with the trustee, whereby he was allowed to dispose of the whole heritable subjects belonging to Mr Crawford at the time of his death, which had been adjudged by the respondent; and he was taken bound to make a fair and rateable division of the free proceeds among the bona fide creditors of Mr Crawford, whose debts were comprehended in the adjudication, according to their respective rights and interests; but this without prejudice to any objections which might exist against the diligence of these parties. The estates were thereafter brought to sale, and their prices realized, which remained in the trustee's hand as a fund of division among that class of creditors who had effectually secured their preferences as creditors of the father. A claim was thereafter lodged by the respondent, founding on diligence done within the three years; and the trustee being advised that it was objectionable, refused it. The respondent thereupon presented a petition to the Court of Session, complaining of this judgment. The case having been remitted to Lord Eldin, the respondent maintained, 1st, That, assuming that the diligence was inept, still the sequestration and relative adjudication under the Bankrupt Act against the heir, James Crawford, within the three years from the date of the father's death, was effectual diligence under the statute 1661, and available to give a preference; but, 2d, That their diligence was unobjectionable.

Lord Eldin found 'the adjudication at the instance of the trus-'tee sufficient to vest the creditors of John Crawford in the sub-

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'the following interlocutor was pronounced by Lord Alloway:—"The Lord Ordinary "having heard the competing parties on their respective claims of preference in this "multiplepoinding, prefers the claimant Robert M'Lachlan, merchant in Port-Glas-"gow, for himself, and the other creditors of the deceased John Crawford, for whom "he is trust-assignee, upon the interest produced for him to the sums due by and in "the hands of the raiser of the multiplepoinding, or which have been consigned by "him for payment to the said Robert M'Lachlan of the whole sums contained in and "due by said interest; and decerns in the preference, and against the raiser of the "multiplepoinding accordingly." The respondent, in his statement of the case, explained, that the trustee had maintained that the diligence was inept by being rendered incompetent by the act of sequestration and adjudication in his favour; and that, in a petition by him to the Court, he had stated, that 'the petitioner will hardly ad-'mit that the sequestration of the estate of James Crawford, and the general adjudi-'cation to the trustee, would have the effect of superseding the necessity of completed 'diligence by the creditors of the ancestor within three years from his death, to the 'effect of saving their preference. This is a question which it is not very necessary to 'discuss. Though it has not been decided, there may perhaps be ground for main-'taining, that the general adjudication of the trustee, as an adjudication for all con-'cerned, might have this effect. But it is true that the petitioner has not admitted this; 'and he does not mean here to discuss the question.'

'jects therein contained, according to their respective rights and 'interests, without the necessity of any further proceeding, so as 'to entitle them to their preferences as creditors who had done 'sufficient diligence within three years of the death of the said 'John Crawford; and, separatim, that the adjudications at 'the instance of John Crawford's creditors, brought into the 'Court of Session in the month of July 1816, are sufficient to 'establish preferences in their favour as creditors of the said John 'Crawford, who had done diligence within three years after his 'death, and that in respect the trustee interrupted the course of 'the said adjudications, whereby the creditors were prevented from 'following out their diligences, and completing them within the 'three years; therefore sustained the said adjudications; but found 'that the adjudications conducted before the Inferior Courts were 'inept and inhabile; and sustained the trustee's objections against 'these adjudications.' June 15. 1829.

The case having come before Lord Medwyn, he recalled Lord Eldin's interlocutor, ordered informations to the Court, and issued the subjoined note.* On advising the informations, the

* 'The Lord Ordinary entertains great doubts of the interlocutor pronounced in 'this case, in all its branches, so far as submitted to review. The first branch of it 'holds, that the general adjudication in favour of the trustee on the heir's estate, being 'within three years of the ancestor's death, is sufficient, without any proceeding on the 'part of the creditors of the ancestor, to constitute in their favour a preference, as if 'they had done complete diligence in terms of the Act 1661. This is a view of their 'right which the creditors themselves had not adopted; for they proceeded to adjudge 'the ancestor's estate, and obtained decree on 3d July 1816. Neither did this view 'occur to the parties or the Court in the competition which took place for Blair of 'Blair's bond, 20th June 1820; and it seems very questionable, although the Lord 'Ordinary cannot concur with all the reasoning of the representer on this matter. 'The effects of the adjudication in favour of the trustee, introduced by the Bankrupt 'Act, must be regulated by the precise enactment; and its object is for the benefit of 'the general body of the creditors, whom the trustee represents, and whose interests he 'is to attend to, in order to entitle him, "for behoof of the whole creditors, to rank in "the same manner upon the heritable estate, as if it had been a common decree of "adjudication, obtained and rendered effectual at the date of the first deliverance, so "as to rank pari passu with any prior effectual adjudication within year and day of the "same." The object is thus to cut down, in favour of all the postponed creditors, any 'adjudication within year and day, and introduce a pari passu preference among them; 'but, according to the view taken in the interlocutor, its effect would be to create a 'preference over the general body of the creditors, even where the individual creditor 'had used no diligence, and perhaps could not have used any effectually. Suppose that, 'a few days within three years of the ancestor's death, the heir becomes bankrupt: in 'consequence of citation, intimation, or perhaps charge to enter heir, if his titles are not 'complete, the creditors of the ancestor could not, within due time, secure any prefer- 'ence by doing diligence in terms of the Act 1661; but if sequestration is awarded 'against the heir, and if the adjudication of his heritage to the trustee is held to be a 'diligence for the special benefit of the creditors of the ancestor, there will thus be con-

June 15. 1889. Court (15th June 1826) found 'the general adjudication in favour 'of the trustee sufficient, without farther proceedings at the in-

'stituted a preference in their favour against the general interest of the creditors, and 'contrary to the precise and definite effect ascribed to the adjudication in favour of the 'trustee in the statute; and embracing not merely the heritable property vested in the 'son by feudal titles, but that in which his right was only personal, and even that in 'which the ancestor's right was also personal. This consequence follows from the pro-'vision in the section 31. Further, the general adjudication declares all the bank-'rupt's right in the estate to be in the trustee, "to the end that the same may be sold, "levied, and recovered, and converted into money for payment of the creditors," mean-'ing, of course, the general body of the creditors whom the trustee represents; and 'therefore the adjudication introduced in favour of the trustee, can apply to nothing 'which he has not the power of converting into money for the general behoof; so that 'it cannot apply to any estate over which a privileged creditor, or class of creditors, 'whose interests are adverse to the general body of creditors, has a claim, and for whose 'behoof the particular estate had been, or may be attached, and taken out of the com-'mon fund. Thus, in the competition for the bond due by Blair of Blair, the subject 'was withdrawn from the operation of the trustee's adjudication, so that it could not 'be sold and converted into money, but was carried by the adjudication at the instance 'of the ancestor's creditors; and if his adjudication could not carry it for creditors, for 'whom alone his adjudication was to operate, it would be an odd effect if it were to 'constitute a preference against them. It is, no doubt, provided, that "no other "adjudication led or made effectual, after the date of the first deliverance aforesaid, "shall have any effect;" but the application of this, so far as regards an adjudication 'by the ancestor's creditors, seems sufficiently guarded by the exception in section 31. 'which declares, "that the rules of preference or ranking between the creditors of the "ancestor and those of the heir, by the law of Scotland, are not meant to be altered "by any thing contained in this Act;" and, accordingly, in the second branch of the 'interlocutor, it is taken for granted, that an adjudication by the creditor of the ances-'tor may be led after sequestration. This declaration seems introduced for such a 'case as the present, to enable the creditors of the ancestor to proceed with diligence 'against the estate, although the heir has been sequestrated; and it would have been 'quite unnecessary to have introduced the declaration, if the adjudication in favour of 'the trustee, eo ipso, created a preference to the ancestor's creditors without any pro-'ceedings on their part. As to the separate finding in the interlocutor, the Lord 'Ordinary cannot see that the trustee did any thing incorrect by receiving an outgiving 'of an adjudication, only called in Court on 5th July 1816. It was quite impossible 'to obtain decree before the Court rose, if it were for no other reason than this, that 'being a first adjudication of the subjects contained in it, it was necessary to intimate 'it for twenty days; and therefore the Lord Ordinary considers this decree of adjudi-'cation, in which the pursuers have not thought it worth while to take decree to this 'hour, utterly ineffectual. The interlocutor takes no notice of the decree of adjudica-'tion pronounced on 3d July 1816, and completed by a charge against the superior 'the day before the three years expired from the period of the ancestor's death. This 'was the diligence founded on by the petitioners before the trustee, the claim on which 'he rejected; and against this judgment the petition, which was the origin of the pre-'sent judicial proceedings, has been brought; and the claim of preference is there 'rested solely on this adjudication. Some objections, in point of form, have been 'stated both to the decree and the process of constitution on which it proceeded; but 'these do not seem, to the Lord Ordinary, to be well founded; and therefore he would 'be inclined to support the preference in favour of such of the creditors as have

'stance of the creditors of John Crawford, to entitle those creditors, according to their respective rights and interests, to their preferences under the Act 1661, as creditors who had done diligence within three years after the death of John Crawford: And appointed the trustee to alter the scheme of ranking complained of, and to rank and prefer the creditors of the said John Crawford in terms of the above finding.'* June 15. 1829.

Bennet appealed.

Appellant.—By the judgment of the Court of Session, the question is now confined to the single point, as to the effect of the adjudication in favour of the appellant. There is no question before the House as to the regularity or the effect of the diligence by the respondent. It must be assumed in hoc statu as unavailing.

In regard to the point at issue, it must be recollected, that at common law, before the statute 1661, the creditors of the ancestor had no privilege whatever in competition with the creditor of the heir, but ranked like the other personal creditors of the heir. The ancestor's estate became as it were a common fund, which was divided without reference to its former ownership. But that statute declared, that the creditors of the defunct shall be preferred to the creditors of the apparent heir in time coming, as to the defunct's estate, on the condition that the defunct's creditors should do diligence against the apparent heir, and the real estate belonging to the defunct, within the space of three years after the defunct's death. Two inferences thus follow:—1. That the statutory privilege, which must be strictly construed, is conferred upon the ancestor's creditors, expressly

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'adjudged, and over the subjects contained in this adjudication, rejecting the effects of 'the general adjudication in favour of the trustee, as creating a preference over the 'other creditors in favour of the ancestor's creditors, although they had done no diligence to bring themselves within the scope of the Act 1661, c. 24., as well as the 'incomplete adjudication which was only called in Court. But as the question is new, 'and involves a point of some importance in the interpretation of the Bankrupt Statute, 'it has been thought most expedient to report the case to the Court.'

* 4. Shaw & Dunlop, No. 433. The appellant stated in his appeal case, that 'he 'was anxious that the Court, in pronouncing the above judgment, should at least give 'full effect to the principle ultimately contended for by the respondents, and apparently 'adopted in the fullest extent by their Lordships, by inserting a finding that the separate adjudications which had been led by the respondents were illegal and incompetent. But the Court refused to insert any such finding.'

June 15. 1829. as creditors of the ancestor, and not as creditors of the heir. 2. That the estate over which the privilege extends, must be proceeded against expressly as the ancestor's estate. The mere circumstance of being an ancestor's creditor, is not sufficient to attract the privilege. He must take the means to vest in himself the preference, by doing complete diligence against the estate within three years of the ancestor's death. But complete diligence is apprising, or adjudication with infeftment, or a charge against the superior to infeft. The lands must be laid hold of, and vested in the creditors. But in the present case, and abstracting at present from the effect of the appellant's adjudication, there has, ex hypothesi, been no diligence done by the respondent at all.

Therefore the question comes to be, whether the Bankrupt Act confers on him the benefit of complete diligence? On attending to the history, object, and spirit of the Bankrupt Statutes, it will appear, that they bestow no such preference as that contended for. It is plain that the Bankrupt Statute, 12. Geo. III. c. 72. could not have created any such preference; for it was confined to the *personal* estate, whereas the Act 1661 related to the heritage. The next Act, 23. Geo. III. c. 18. although extended to the real estate, is little more than an extension and continuation of the previous Act, and clearly had reference only to the bankrupt's own proper estate and creditors. It no doubt declares, (when directing that the trustee shall complete the bankrupt heir's title to property of an ancestor), that the rules of preference of ranking between the creditors of the ancestor and those of the heir, by the law of Scotland, are not meant to be 'altered.' This provision, therefore, just leaves matters as they were; that is, if the ancestor's creditors have done complete diligence, they will take their preference; if they have not, they will lose their preference. The clause in the present Act, 54. Geo. III. c. 139. is precisely the same, and is liable to the same observation. But farther, the object and spirit of all the Bankrupt Acts is to prevent, not to create preferences; and it is expressly declared, that effect is to be given only to those preferences which have been obtained prior to the sequestration. Therefore the plea of the respondent is contrary both to the spirit and to the letter of the statute.

But farther, by the Act 1661 the estate must be adjudged as that of the ancestor. It is true, that the diligence is directed against the heir; but then it must be to the effect of attaching

the estate as that of the ancestor. The sequestration and relative adjudication are directed only against the heir in his individual, and not in his representative capacity, and against his private estate, and not against that which was left in hæreditate of the ancestor. It is therefore impossible to assimilate such a process to the diligence required by the statute 1661. June 15. 1829.

Respondent.—It is true, that before the Act 1661, c. 24. there seems to have been no distinction between the rights of those to whom the ancestor had been indebted, and those who were proper creditors of the heir. The heir being held to be eadem persona cum defuncto, every creditor of the ancestor became the heir's creditor by the force of representation; and his whole estate, as well that to which he had succeeded, as that which he might have separately acquired, became indiscriminately attachable by the creditors. But the Act 1661, c. 24. introduced a regulation highly beneficial to that particular class of the creditors of the heir whose debts had been contracted by the ancestor. It provided, that they should have a preference with relation to the ancestor's heritable property, if they executed diligence against that property within three years. But this statute left untouched the general principle of the heir's responsibility. Since the statute, as before, he is the debtor, and the only debtor in all the debts, and of all the creditors. He is the debtor in two classes of debts, differently privileged,—the one contracted by himself directly, and the other secondarily or by representation. The only effect of the statute, therefore, is to create a preference in favour of the debts of the latter kind, with relation to a certain class of subjects belonging to the debtor, viz. those which he took by succession from the ancestor; and it is clear that the statute does not separate, in any other sense, the creditors of the heir from the creditors of the ancestor, or render these two characters incompatible. The creditors of the ancestor, in doing diligence against his property, are not barred from claiming as creditors of the heir. If they do such diligence, they have their preference, and still remain creditors for any balance against the heir's remaining estate. The statute merely creates in their favour a capacity of receiving a certain preference by diligence, if that diligence be done within the three years after the ancestor's death. But how are the rights of parties privileged by it affected by 54th of Geo. III. c. 137.? Its object is to prevent the expense of separate legal measures

June 15. 1809. by the creditors of the bankrupt. But the creditors of the ancestor are also creditors of the heir in his representative capacity; and it is highly expedient that separate diligence by them should be prevented. With this view a sequestration, accompanied by an adjudication, is ordained to be granted in favour of a trustee, for behoof of all the creditors without distinction. And then it is specially enacted by section 31. 'that 'in case the bankrupt's own titles to any part of the estate, 'heritable or moveable, real or personal, which belonged to him 'at that period, or to which he had then succeeded as apparent 'heir, nearest in kin, or otherwise, to any predecessor, have not 'been so completed as to vest the right properly in him, the 'trustee shall take the most safe and eligible method of complet-'ing the bankrupt's title in such way and manner as the law 'requires; which title shall accresce to that already acquired by 'the trustee, in the same way as if it had been completed prior 'to the disposition by the bankrupt, or adjudication against 'him.' And then there is the following saving clause:—'Declar-'ing, that the rules of preference or ranking between the credi-'tors of the ancestor and those of the heir, by the law of Scot-'land, are not meant to be altered by any thing contained in 'this Act;'—a clause which can have no other meaning but the reservation in favour of the particular class of creditors privileged under the Act 1661, of the effect attendant on the adjudication, in so far as it affected lands which had belonged to the bankrupt's ancestor. By the 42d section it is declared, that 'no other 'adjudication, led or made effectual after the date of the first 'deliverance aforesaid, shall have any effect in competition with 'the right of the creditors under the sequestration.' All that is required to give the creditors of the ancestor the preference created by the Act 1661 is, diligence within the three years. But the statute of 54. Geo. III. provides, that the adjudication by the trustee shall be complete diligence from the first deliverance for behoof of all the creditors of the bankrupt; and in declaring such to be its effect, it reserves the preference between the creditors of the heir and the creditors of the ancestor; so that the adjudication of the trustee, if within the three years, must have that very operation in favour of the creditors of the ancestor, which an adjudication at their own instance would have had if there had been no sequestration. The creditors, therefore, in the debts originally contracted by John Crawford, the ancestor, or in those for which he was legally responsible at his death, are, in virtue of the combined operation of the Act 1661,

c. 24. and the Act of 54. Geo. III. c. 137., entitled to a preference, in regard to the heritable property of the ancestor, over the creditors in debts contracted by the heir. June 15. 1829.

The House of Lords ordered and adjudged, that the interlocutor complained of be affirmed.

Lord Chancellor.—There is a case, Bennet v. M'Lachlan, in which I shall move your Lordships for the judgment of the House. In this case, my Lords, John Crawford, in partnership with his sons, carried on business at Port-Glasgow as merchants. John Crawford ceased to carry on business in the year 1811,—he died in 1813. He was succeeded in his business by James Crawford, his eldest son, who continued business afterwards in partnership with his (James Crawford's) two brothers; but the business of the firm was still carried on in the names of John Crawford and Company. In the year 1816 John Crawford and Company became bankrupt, and a sequestration was issued, and Mr Bennet was appointed and confirmed trustee, both with respect to the estate of the partnership, and also with respect to the estates of two of the individual partners.

Now, my Lords, at the time of Mr Crawford's death he left debts to a large amount, and he left a considerable estate. James Crawford was the heir of his father, and in a settlement made by Mr Crawford, James was directed to make up titles to the estate, which was to become the property, in certain proportions, of James Crawford and the other sons of Mr Crawford. Those titles were partly made up; but the debts of the father were not paid, at least to their full extent. There was a very large claim remaining unsatisfied at the time of the bankruptcy. By the law of Scotland, founded on an Act passed so long ago as the year 1661, as between the different creditors of the heir and the ancestor, a preference is given against the ancestor's estate, in favour of those persons who were creditors of the ancestor. That preference is given upon a certain condition, which is, that diligence be done within a period of three years; and in construing that Act of Parliament it has been decided, that by diligence, complete diligence is meant, and therefore, unless the creditor completes his diligence, within the period of three years, he loses this preference. The words of the Act are:—(His Lordship then quoted the Act).

Now, my Lords, this is the general state of the law, as between the creditors of the ancestor and the creditors of the heir.

The question in this case arises out of the 54. Geo. III. cap. 137., respecting the sequestration of bankrupt estates in Scotland. Under that Act there is a general adjudication directed against the whole property of the bankrupt; and the question is, whether that general adjudication embraces within it the property of the ancestor, so as to render it unnecessary for the creditor of the ancestor to go on and complete

June 15. 1829. diligence within the time limited by the Act 1661? Now, my Lords, it certainly is extremely convenient that that construction should be put upon the Act 54. Geo. III.; because, in the first place, it tends much to diminish the expense of the proceedings: the creditors of the heir would have the benefit only of the surplus of the ancestor's estate after the debts of the ancestor are discharged; and therefore it seems very much for the benefit of the general creditors of the heir, that as little expense should be incurred in settling the ancestor's estate as possible. If each creditor, therefore, of the ancestor is to do separate diligence, the consequence will be, that very considerable expense will be incurred; and that expense so incurred will so far tend to the diminution of that surplus, the benefit of which will ultimately belong to the general creditors of the heir. In the next place, that conclusion would also tend materially in many instances to delay, because, instead of enabling a trustee almost immediately to distribute the estate, it would be necessary to wait until the period of three years had expired, for the purpose of ascertaining what the surplus was; and so far that would be also productive of inconvenience: and, on the other hand, it does not strike my mind, that there is any corresponding convenience to that which I have referred.

But still, after all, this case must be governed by the construction of the 54th of Geo. III. By the 15th section of that Act it is declared, that the great object of the Act is, as speedily and expeditiously as possible, to distribute the effects of the bankrupt, without abiding (I think is the expression) the ordinary forms of law; and accordingly, by summary petition to the Court of Session, sequestration is immediately awarded. When we come to the 29th section we find, that, by the provisions in that section, all the property of every description belonging to the bankrupt is to be assigned and transferred to the trustee; and if the bankrupt himself will not assign and transfer it, property of every description becomes then vested in the trustee, for behoof of creditors, by the operation of law. And by the section immediately following, (30th), it is provided, 'that the property shall vest in the trustee, for behoof of all the creditors;' so that the whole of the property of the bankrupt is transferred to the trustee; and it is declared, that the whole of the property so transferred shall be for the behoof of the whole of the creditors. But the property which comes to the heir from his ancestor is a part of the property of the bankrupt: when, therefore, the Act of Parliament provides, that all the property shall vest in the trustee for the benefit and behoof of all the creditors, it seems that it comprehended the estate which had belonged to the ancestor, as well as that particular property which did not belong to the ancestor, but belonged to the heir exclusively.

My Lords, in a subsequent section your Lordships will find, that the property which the heir takes as 'apparent heir,' is distinctly ad-

verted to, so that the attention of the Legislature appears to have been directed to that particular. June 15. 1829.

The Act provides, that in case the bankrupt's own titles to any part of the estate, real or personal, which belonged to him at that period, or to which he had then succeeded as apparent heir, nearest of kin, or otherwise, to any predecessor, have not been so completed as to vest the right properly in him, the factor and trustee shall take the most safe and eligible method of completing the bankrupt's title, in such way and manner as the law requires; declaring always, that the rules of preference or ranking between the creditors of the ancestor and those of the heir, by the law of Scotland, are not meant to be altered by any thing contained in this Act. It does not say, that the course of proceeding with respect to this preference is not to be altered, but merely that the rules of preference or ranking between the creditors of the ancestor and those of the heir are not meant to be altered by the operation of the Act; so that the whole property is conveyed for the behoof of all the creditors: and then, to prevent any inference which might be drawn, tending to the conclusion that the creditors of the ancestor were meant to be affected by the Act,—for the purpose of avoiding that conclusion,—the clause to which I have adverted is inserted, stating, that the rules with respect to the preference between the creditors of the ancestor and those of the heir are not meant to be altered.

In the 42d section it is distinctly provided, that no other adjudication, led or made effectual after the date of the first deliverance aforesaid, shall have any effect in competition with the right of the creditors under the sequestration; so that it is clear, that, in the general adjudication, the first adjudication is the adjudication that is to affect the whole property, and that no other adjudication, led or made effectual after the date of the first deliverance aforesaid, shall have any effect in competition with the rights of the creditors under the sequestration; thereby in effect enacting, that no proceedings whatever are to be carried on for the purpose of obtaining an adjudication by those persons who are creditors of the ancestor.

My Lords, taking all these clauses together, I cannot bring my mind to entertain any degree of reasonable doubt as to the intention of the Legislature. I have adverted to the other sections of the Act, which were alluded to during the argument at your Lordships' Bar; but it appears to me that there is not one of them that is not reconcilable with the view of the subject which I have taken. I do not mean to say that some degree of doubt and some degree of uncertainty might not have rested on those other sections, if taken separately; but the whole must be construed together; and the sections to which I have adverted appear to me to speak in a clear and distinct language, and I think may be reconciled with those other sections, which, if they stood by themselves, might possibly have thrown some degree of doubt upon the case.

My Lords, it was stated at the Bar, and correctly stated, that there

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had been a contradictory decision from that against which this appeal has been lodged; but that case is open to this observation, (I mean the case of the Blair bond), that this question was not there raised before the Court. It was considered by the parties on both sides, (although the point was open), I suppose for their mutual interest, that it should be waived. But certainly the point was never argued; and therefore that decision, although in its terms at variance with the decision to which the Court of Session has since come, can hardly be considered as possessing much weight with respect to the present question.

My Lords, there were other subordinate points in the case, to which it does not appear to me to be necessary to advert. The main question that was argued at your Lordships' Bar was the question to which I have called your attention. I think, on reference to the sections of the Act of Parliament of the 54. Geo. III., upon which the case must ultimately rest, your Lordships will be of opinion, that the judgment of the Court of Session is correct, and that it ought therefore to be affirmed.

Appellant's Authorities.—3. Ersk. 8. 101.; 1. Bell's Commentaries, p. 729.; M'Kenzie's Observations, p. 394.; 2. Stair, 12. 29. and 4. 35. 16.; 3. Bank. 5. 67.; Bellenden, March 1685, (3127.); Taylor, Dec. 9. 1747; Arniston, March 1686, (2. Sup. 92.)

Respondent's Authorities.—1. Bell's Commentaries, 729.; Grahame, Nov. 27. 1751, (12,160.); Bellenden, March 1685, (3127.)

MONCREIFF, WEBSTER, and THOMPSON—SPOTTISWOODE and ROBERTSON,—Solicitors.

No. 32.

WILLIAM COLHOUN STIRLING, and his Commissioners, Appellants.—*Keay—Dunlop.*

WILLIAM DUN, Respondent.—*Lushington—A. M'Neill.*

Entail—Lease—Acquiescence.—1. Held, (reversing the judgment of the Court of Session), that the word 'dispone' in an entail strikes at leases of extraordinary endurance. 2. That the lease of a loch for 300 years is in no more favourable situation—in a question whether such lease falls under the prohibition to dispone—than any other part of the entailed estate. 3. That (affirming the judgment) a pro indiviso share of a loch, forming part of an entailed estate, is subject to the fetters of the entail. 4. Circumstances held not to constitute an acquiescence barring the heir of entail from challenging the lease in a question with an onerous assignee.

June 22. 1829.

2D DIVISION. Lord Newton.

BY the entail, executed in 1691, of the estates of Law and Edinbarnet, with the pertinents thereof, it is declared, 'That it 'shall not be leisome or lawful to any of the heirs of tailzie above 'mentioned (except the heirs-male of my own body), to sell, dis-'pone, wadset, or impignorate the said lands and others fore-

'said, or any part or portion thereof, or to grant infeftments of 'annualrent out of the samen, or any other right or security, 'either redeemable or irredeemable, of the said lands or others 'foresaid, or any part thereof; nor to contract debts, nor do 'other deeds of omission or commission, either civil or criminal, 'whereby the said lands and others foresaid, or any part of the 'samen, may be apprized, adjudged, evicted, or become cadu-'ciarie, escheat, or confiscat.' These prohibitions were fenced by the usual irritant and resolutive clauses. June 22. 1829.

The entailer had no issue male,—but James Stirling succeeded through a daughter.

The entailed land and the property of a neighbouring heritor surround the Loch of Cochney, of which about one-third pro indiviso belongs to Edinbarnet estate. Of this loch James Stirling, in 1787, let to the Duntocher Wool Company, 'all and whole 'his part, share, and interest, with the water-course therefrom, so 'far as is necessary for drawing the water from the said loch; 'with full power and liberty to the said company to construct 'and place a bank and sluice upon the said loch, at or near the 'place where the present sluice is, for the purpose of increasing 'the water in the said loch for the use of their mills on Dun-'tocher Burn, and to raise the said bank or sluice to the height 'of 25 feet above the present height of the water in the loch, or 'higher if they think proper; and to take earth and turf from 'the adjoining lands for making their bank, without being liable 'in payment of any price or damages therefor; and also, what-'ever ground adjacent to, and round the part of the said loch 'above set, may, by raising the said bank and sluice, be laid un-'der water, and thereby constitute part of the said loch; and that 'for all the days and years of 300 years from the term of Martin-'mas 1786, at which term the entry of the said company is here-'by declared to have commenced.' The rent was to be L.3 annually; and the granter bound himself, his heirs and succes-sors, in absolute warrandice against all mortals. At the same time the Duntocher Wool Company obtained a lease from the other proprietor of his share of the loch, for 38 years, at the rent of L.40.

This lease came by transference to Robert and Richard Den-nistoun, and Colin M'Lachlan, merchants in Glasgow. James Stirling had also granted to John Gillies a lease for the like period of a lint-mill, and certain parts of the entailed estate, and which lease had come to M'Dowall and others by assignment.

June 22. 1829.

On the death of James Stirling, the next heir of entail, Agnes Hamilton, instituted a reduction of the lease of the loch, in respect, inter alia, that it had been obtained 'for a trifle of value, 'with diminution of rental, contrary to the limitations and conditions of the deed of entail under which the said James Stirling, 'the granter, possessed the estate, and for such unusual length of 'time as would in law amount to a perpetuity; and consequently 'is not legally a tack, but resolves into a permanent alienation or 'eviction of so much of the property, besides laying intolerable 'burdens and servitudes upon the whole estate, to the enorm lesion 'and prejudice of the granter himself, and his heirs of entail, if it 'should be sustained against them.' An action of reduction was also instituted as to the mill lease, &c. against M'Dowall and others.

The Court of Session, in both actions, repelled the reasons of reduction, 'in so far as founded on the prohibitory clause in the 'deed of entail;' and thereafter (3d March 1815) adhered, 'without prejudice to the lessees being heard upon the effect of 'grassums having been paid for the leases in question, in the 'event of their being able to shew that grassums were paid.'* Mrs Hamilton died in 1817, and William Colhoun Stirling succeeded as next heir of entail. The question as to the lease of the mill was settled in consequence of the tenant renouncing the lease in favour of Stirling, who, in 1825, appealed the other action as to Cochney Loch.† Besides Richard and Robert Dennistoun and M'Lachlan, he called as a party William Dun, whom he understood to have acquired the lease of the premises subsequently to the judgment in the Court below. In consequence of Dun objecting that he was no proper party to the appeal, since he had not been heard in the proceedings in the Court of Session, the parties agreed to petition the House of Lords for a remit; and, in consequence, obtained an order that 'the cause be remitted to the Court of Session, to the effect that 'William Dun, the said assignee, may be heard for his interest, 'and that the said Court do therein as shall seem to them just 'and proper.'

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* This judgment was pronounced in the action against M'Dowall and others, but applied to both cases,—M'Dowall's case being the leading action, and to the pleadings in which the others made reference. Hamilton v. M'Dowall and others, March 3. 1815; F. C.

† During the previous proceedings, William Colhoun Stirling had been in India. He returned in 1821, and again went to India in 1824, having appointed certain individuals his commissioners.

When the case returned to the Court below, Dun refused to appear, unless called by a supplementary action. This having been done, he stated in defence the same general plea which had been relied on by Dennistouns and M'Lachlan,— June 22. 1829.

That although, from the interpretation which had been given to the word 'alienate,' it would affect long leases, yet there was a distinction between 'alienate' and the term 'dispone;' that when (as in this case) the word 'dispone' was not coupled with other words, which showed an intention of using it in a generic sense, and more especially when it stood in connexion with other words which referred to particular modes of alienation, it was to be construed, like these words, as a technical phrase for a particular form of conveying property: and that besides, a prohibition against disponing (even when the term was used in its most ample sense) was only effectual against leases which had been granted on grassum, to the prejudice of succeeding heirs.

In addition to this plea he farther maintained,—

1. That the pursuer was barred from challenging the lease. The defender had paid a great price for it, and had been allowed, under the belief that his title was unchallengeable, to expend large sums in erecting manufactories on the stream leading from the loch. When at home, the pursuer had not interpelled him, but had tacitly acquiesced; he resided within a mile of the works, and was in constant communication with the defender; and from 1821, when he returned to India, to 1825, when the appeal was taken, not a whisper of disapprobation was uttered: on the contrary, he knew, without interfering, that works worth L. 100,000 were raising on the side of the stream,—that they would be worthless if the supply of water, which the defender could command by his lease, were cut off; and although it was true that the defender had not paid the rent, it was not unusual, when so small, to allow it to run into arrear; but at all events this was not relevant to infer non-acquiescence, unless the pursuer could shew, quo animo, it was neither received by him, nor paid by the defender.

2. That a lease of 300 years of a subject which yielded no fruit of itself, and could only be made productive by being let for a period of long endurance, was not an act of extraordinary administration. And,

3. That a pro indiviso right in a loch, is not susceptible of being brought under the fetters of an entail.

To this was answered,—

June 23. 1829. That the prohibition to dispone, contained in this deed of entail, was equivalent to a prohibition to alienate; and was effectual to prevent an heir, possessing under such entail, from granting leases of any part of the entailed estate, whether water or land, for the extraordinary endurance of 300 years, even although no grassum were given: That whatever might have been the doubts formerly entertained on this point, the question had been settled; and, in particular, by a case relative to leases granted of land under the entail now in discussion:* And that if a grassum had been given, the lease would certainly have been struck at by the word 'dispone,' as granted under the true avail.

With reference to the new pleas it was answered,—

1. That the pursuer could not be barred merely because he was silent; but the fact was, that he did inform the defender that the right would not be recognized; and the assignation proved, that it was granted after the action of reduction had been raised, and only a few months before the first judgment in the cause; so that the defender could not have been led into the belief that the lease would not be challenged;—that accordingly the pursuer never would accept of rent, nor recognize the lease in any way;—that, besides, as the defender's lease of the rest of the loch from the other proprietor terminated in 1825, and he could not draw off water adequate to the demand of his manufactories without relying on the supply to be derived from a renewal of that lease, it was impossible he could allege that he had erected them on the faith of the lease in question.

2. That a lease for 300 years was one greatly beyond the usual period of endurance,—was in truth an alienation,—and therefore was an act of extraordinary and unwarrantable administration. And,

3. That a pro indiviso right in a loch is as susceptible of being fettered by an entail as any other heritable subject.

The pursuer also maintained, that, under the remit from the House of Lords, it was competent for the Court to decide on the merits of the principal point, as well as on the additional ground.

The Court found, 'that there had been no acquiescence 'on the part of the pursuer to bar him from insisting in 'this conjoined action against the defender: That the lease 'of a loch for the period of 300 years, stands in the same

* Stirling v. Walker, Feb. 20. 1821; F. C. Two other leases of part of the same estate were also reduced, but the cases have not been reported.

'sitnation as if it were a lease of any other part of the en- June 22. 1809.
'tailed estate: That a loch, or a portion thereof, forming a
'part of an entailed estate, is subject to the fetters of the entail
'of such estate; and therefore repelled the defences now first
'pleaded by the defender: But in respect that the judgment
'of remit by the House of Lords does not empower this Court
'to review the interlocutors formerly pronounced in the ori-
'ginal action, and which are still under appeal, in terms of
'the said interlocutors, repel the reason of reduction, in so far
'as founded on the prohibitory clause in the deed of entail, and
'decern; but find no expenses due to either party.'*

Stirling appealed as to the validity of the lease, and Dun cross-appealed against the special findings, and the refusal of expenses.

As the House of Lords had no difficulty in regard to the special findings, and to the import of the word 'dispone,' which had, since the date of the former appeal, been fixed by judgments of the House, it is unnecessary to repeat the arguments of parties.

Their Lordships, therefore, in the original appeal by Stirling, ordered and adjudged, 'that the interlocutors appealed from be
'reversed; and it is further ordered, that the cause be remitted
'back to the Court of Session, to do farther therein as may be
'consistent with this judgment, and as may be just.' And in the present appeal, and cross-appeal, their Lordships 'ordered and
'adjudged, that the said interlocutor, in so far as complained of
'in the original appeal, be reversed. And it is farther ordered and
'adjudged, that the said cross-appeal be dismissed this House,
'and that the said interlocutor, so far as complained of in the
'cross-appeal, be affirmed. And it is further ordered, that the
'cause be remitted back to the Court of Session, to do farther
'therein as may be consistent with this judgment, and may be
'just.'

Lord Chancellor.—My Lords, in a case in which William Colhoun Stirling and others are appellants, and Robert Dennistoun and Richard Dennistoun and others are the respondents, and also in a case in which William Colhoun Stirling and others are appellants, and William Dun is the respondent, I am to move for your Lordships' judgment; and I will state, very shortly, the grounds on which I shall

* 6. Shaw and Dunlop, No. 104. p. 272.

June 22. 1829. recommend to your Lordships the judgment which, in my opinion, it will be proper for your Lordships to pronounce.

This case arises out of a deed of entail, which was executed in the year 1691 by William Stirling, of the estates of Law and Edinbarnet in Scotland. The property under that entail came afterwards to James Stirling; and in the year 1787 James Stirling, being at that time in possession of the property, granted a lease of that part of it which is the subject of the present inquiry. The property to which this question relates, was a part of the loch of Cochney, with the stream running from it, which was settled under that deed of entail. The rest of the loch belonged to the owner of the adjoining estate. James Stirling granted a lease of his portion of this loch, together with the stream which runs from it, to a person of the name of John Gillies, for the term of three hundred years. There was also a power given to raise an embankment to the height of twenty-five feet; and as the effect of raising that embankment, in the manner I have described, would be to raise the water, and give it a further extent upon the adjoining land, he included also so much of the adjoining land as should be covered with the water so raised. The question is, whether, under the terms of the entail, the party who was in possession of the entailed estate, by virtue of the deed of entail, had authority to make the lease in question?

My Lords, there is in the deed of entail this prohibitory clause:—'That it shall not be leisome or lawful to any of the said heirs of 'tailzie, except the heirs-male of my own body,' (that is, of the party creating the estate tail), 'to sell, dispone, wadset, or impignorate the said lands or others foresaid, or any part or portion thereof, or to grant infeftments of annualrent out of the same, or any other right or security, either redeemable or irredeemable, of the said lands or others foresaid, or any part thereof, or to contract debts, nor to do any other deed of omission or commission, either civil or criminal, whereby the said lands and others foresaid, or any part of the same, may be apprized, evicted, or become caduciarie, escheat, or confiscate.' This prohibitory clause was fortified in the usual way, by irritant and resolutive clauses, the terms of which corresponded with the terms contained in the prohibitory clause; and the main question for your Lordships' consideration is, Whether, James Stirling having granted this lease in the year 1787, for the term of three hundred years, reserving the rent of L. 3 a-year, with at the same time a regulated supply of water, for a certain portion of the year, for a mill which formed part of the estate, this deed could, under these circumstances, be supported?

This question came before the Court of Session in the year 1814, in an action of reduction which was brought by Miss Agnes Hamilton, who was at that time in possession of the entailed estate, for the purpose of setting aside this lease. The Court of Session were of opinion that that action of reduction could not be sustained; and the

Court appear to have come to that conclusion, from an opinion which was at that period prevalent among the lawyers in Scotland, that where the word 'dispone' is made use of, that word has reference to a particular mode of conveyance, known in the law of Scotland by the name of a disposition; and that the word dispone had not the general sense of 'alienate,' to which it has been since considered entitled. This judgment of the Court of Session was pronounced in the year 1815. Mr Colhoun Stirling, who is the present appellant, becoming entitled to the estate tail in the year 1817, was at that time in India, and came to this country in the year 1821; and after returning to India in 1824, this appeal was, in 1825, lodged in this House. I have mentioned that the lease was originally granted to a person of the name of John Gillies. He assigned the lease, and his assignees again assigned it; and it was against those second assignees that the second action of reduction was brought. Those second assignees again assigned to William Dun, who is one of the parties of this record. William Dun was no party in the suit below, because it was not supposed, at the time when the suit was instituted, and the judgment pronounced, that any assignment of the property had been made to Mr Dun. However, Mr Dun was made a party to the appeal at your Lordships' Bar; and he contended, that as he was no party to the cause in the Court below, he could not be made a party to the cause in the first instance in the appeal at your Lordships' Bar. Your Lordships were of that opinion, and you were restrained therefore from pronouncing judgment at that period, in order that the case might go back by a remit to the Court of Session, that William Dun might be heard with reference to his interest. June 22. 1829.

When the case went back, the Court below was of opinion that a supplementary action was necessary against William Dun. Such supplementary action was brought, and the whole matter was again investigated by the Court; and the discussion, on this second occasion, was not confined to the simple question, whether or not there was authority to grant a lease for 300 years under the terms of the deed of entail, but other questions were agitated. It was contended, that Colhoun Stirling, the present appellant, had acquiesced in the lease; and it was further contended, that whatever might be the rule as to long leases of agricultural subjects, that rule could not be applied to property of the description in the present case. When that case came for judgment before the Court of Session, the Court pronounced the judgment I am now about to read to your Lordships. (His Lordship then read the judgment, p. 466.) Therefore it is perfectly clear, from the terms of that judgment, that the points which the Court intended to decide, were those new points that had been raised for the first time; and that, with reference to the main question for your Lordships' consideration, the Court merely, for the sake of form, confirmed their previous determination, on the ground that the case was at that time under the consideration, and subjected to the revision, of your Lordships.

June 23. 1829. Having stated to your Lordships the position of this record, the first question will be, Whether this lease is warranted by the deed of entail? I have mentioned to your Lordships, that at the period when the original judgment was pronounced, many lawyers of eminence in Scotland were of opinion that the word 'dispone,' in an instrument of this kind, could have only the limited interpretation to which I have referred. That question was afterwards brought before this House in the Queensberry cases. It was much agitated at your Lordships' Bar, and much weighed in this House; and the learned Lord who at that time sat upon the woolsack, after much inquiry and much consultation, and referring to all the authorities upon the subject, came, with your Lordships' approbation, to this conclusion, —that although the word 'dispone' had the limited construction to which I have referred, it also had, in the law of Scotland, a more extended construction, and was equivalent to the word 'alienate.' My Lords, in another case, that of Elliott v. Potts, that opinion of your Lordships was confirmed; and we must consider it now as the law of Scotland, in reference to a lease of this description, where an heir is prohibited from selling, disponing, wadsetting, and impignorating, that, according to the terms and construction of the particular parts of the deed of entail, and the object of the entailer, according to the construction of that instrument, you are to decide what is the particular meaning of the word 'dispone,' as used in that instrument.

Now, my Lords, I must take the liberty of mentioning, that the question, subsequently to the decision now appealed from to your Lordships, was again brought before the Court of Session with reference to this very deed of entail, in three successive cases,—one of those cases is reported in the Faculty Collection;* and in all those three cases the Court of Session was of opinion, that, in this particular instrument, the word 'dispone' was, upon the authority of the Queensberry cases, to which I have referred, to be considered as equivalent to 'alienate;'—that the word 'dispone' was not to be regarded as having the limited construction to which I have referred, but that it should have the extended construction applied to the word 'alienate.' Those three cases, which have been decided by the Court of Session, are inconsistent in principle with the decision of the Court of Session which is now the subject of the present appeal; and from those decisions there has been no appeal to your Lordships' House. Independently of every other consideration, these cases are strong authorities for leading your Lordships to the conclusion, that it would be proper to reverse the judgment against which this appeal has been preferred.

My Lords, in addition to that, it does appear to me impossible, in adverting to the provisions of the deed of entail, to come to any other conclusion than this,—that it was the obvious intention of the parties

* Stirling v. Walker, February 20. 1821.

to that deed of entail, to use the word 'dispone' in the sense which I have given to it; and that it was intended, that the parties entitled as heir of entail from time to time, should not have the power of alienating the property, so as to interfere with the object the settler had in view when the estate in tail was originally created. I think therefore, that, under all circumstances, I should recommend to your Lordships, if the case rested here, to reverse the judgment of 1815; and in reversing that judgment, we shall be acting in conformity to the decisions of the Court of Session itself, in those three cases to which I have adverted, upon the very instrument now under your Lordships' consideration. June 23, 1829.

My Lords, it was stated, and was argued at your Lordships' Bar, that this was not to be considered like the lease of an agricultural subject,—it being the lease of the loch I have mentioned—Cochney loch, with the stream running from it, for which a rent has been reserved; and that unless the power was given, or intended to be given, to grant a lease of this description, the property would have returned no benefit whatever to the proprietor: that granting a lease of this description, is the proper administration of property of this kind. My Lords, I shall not feel it necessary to enter into any minute detail or consideration, as to what duration of lease of property of this description must be regarded as proper administration of the property. It is not necessary for me to draw any precise line in a lease of this nature; because I presume that your Lordships will be of opinion, that, at all events, it is not necessary that a lease of three hundred years should be granted for the purpose of leading to a proper administration of property of this nature. I should think, therefore, that, under these circumstances, your Lordships would be disposed to concur in the judgment which the Court of Session pronounced in the case when remitted to them, with respect to this point of the subject, and to state that, in your opinion, according to the terms of the judgment of the Court below, a lease of a loch for the period of three hundred years stands in the same situation as if it were a lease of any other part of the entailed estate. I think that your Lordships will have no hesitation in coming to a conclusion of affirming that part of the judgment of the Court of Session.

My Lords, the remaining question is as to the acquiescence. I have read most attentively through the facts of the case, as far as they relate to the supposed acquiescence; and it appears to me, that there are no grounds whatever leading to the conclusion, that Mr Stirling has acquiesced in the judgment of the Court, or in the lease in question. Mr Stirling was in India in the year 1817, when his right first accrued. He came to this country in the year 1821. He declined receiving any rent for the property, and within the time limited by your rules he has instituted this appeal; and there are no circumstances of any description in this cause, as it appears to me, sufficiently strong to lead to the conclusion that he has waived his right, and that he is not

June 23. 1829. in the situation to support this appeal. The result, upon the whole, is this, that I should recommend to your Lordships to reverse the judgment of the Court of Session in the year 1815, and to declare your concurrence in the judgment pronounced by the Court below, in respect of those several special points, (to which I have adverted), when they considered the question upon the remit from your Lordships' House.

Appellants' Authorities.—Reg. Maj. lib. 2. c. 20.; Spottiswoode, p. 306.; Bal. Prac. p. 163. 200–207.; Maj. Prac. tit. 29. p. 814.; M'Kenzie's Works, vol. ii. p. 487.; 1585, c. 11.; 1597, c. 235.; 1581, c. 101.; Dirl. 146.; Queensberry, March 7. 1816, and Feb. 5. 1818, (F. C.); July 10. 1817, or July 12. 1819, (5. Dow, 293.); Elliott, March 10. 1814, (F. C.), and March 14. 1821, (1. Shaw's Ap. Cases, p. 16.); Baroness Mordaunt, March 2. 1819, (F. C.), and July 5. 1822, (1. Shaw's Ap. Cases, p. 169.); Duke of Gordon, Nov. 22. 1822, (2. Shaw and Dun. No. 31.); Malcolm, June 19. 1823, (2. Shaw and Dun. No. 387.); Stirling, Feb. 20. 1821, (F. C.); Turner, Nov. 17. 1807, (App. voce Tailzie, No. 16.); Sir John Malcolm, Nov. 17. 1807, (App. voce Tailzie, No. 17.); Earl of Wemyss, May 25. 1813, (F. C.)

Respondent's Authorities.—3. Bank. 2. 1.; 2. Erak. 7. 2.; M'Kenzie's Works, vol. ii. p. 487.; Earl of Elgin, June 13. 1821, (1. Shaw's Ap. Cases, p. 44.); Lockhart, Nov. 25. 1755, (15,404.)

SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNELL,—Solicitors.

No. 33. DOWNE, BELL, and MITCHELL, Appellants.—*Lushington—Murray.*

JOHN PITCAIRN, and Others, Respondents.—*Adam—Jervis.*

Title to Pursue—Partnership—Compensation—Process—Appeal.—1. Circumstances under which the title of the office-bearers of an unincorporated association to pursue, was sustained. 2. A plea of compensation, founded on an alleged disputed claim, repelled, (affirming the judgment of the Court of Session). And, 3. It would seem that an appeal against an interlocutory judgment, taken after the final decision of a cause, although the decree exhausting the cause is not appealed against, is competent.

June 24. 1829.

2D DIVISION. Lord Pitmilly.

THE Edinburgh and Leith Shipping Company had for some time employed Alexander Mitchell as their agent at London, in the course of which he received sums of money belonging to them; and, as he alleged, he made advances to and for them. In October 1809, and before any settlement of accounts, the Shipping Company entered into a contract with Downe, Bell, and Mitchell, wharfingers in London, (of which Mitchell was a partner); the general object of which was to secure, for the vessels of the Company, the exclusive use of the wharf on the Thames, belonging to Downe, Bell, and Mitchell, and to con-

stitute these persons the sole wharfingers and agents of the Shipping Company. The contract was made on the one part by 'John Pitcairn, Esq. merchant in Edinburgh, president or 'chairman of the Society or Company known by and carrying 'on business at Leith under the firm and title of the Edin- 'burgh and Leith Shipping Company; Archibald M'Kinlay, 'Esq. haberdasher in Edinburgh, first vice-president of the said 'Shipping Company; William Gilchrist, Esq. also haberdasher 'in Edinburgh, second vice-president of said Company; Messrs 'Robert Ogilvy, Walter Gibson Cassells, James Reoch, and 'James Fortune, merchants in Leith; and Messrs Robert Scott, 'apothecary, John White, jeweller, Thomas Miller, glover, 'Robert Morton, jeweller, Archibald Campbell, brewer, Wil- 'liam Fraser, senior, merchant tailor, Alexander Henderson, 'seedsman, and William Aitchison, jeweller, all of Edinburgh, 'directors of the said Edinburgh and Leith Shipping Com- 'pany, or the quorum of them, subscribing for themselves, and 'for and on behalf of, and as taking burden on them for all 'and every other person or persons who are at present, or 'hereafter may be, partners of the said Company, under the 'authority and by virtue of powers vested in them by their 'partners.' And, of the other part, by 'Messrs William Downe, 'William Bell, and Alexander Mitchell, who constitute the 'Society or Company known by, and carrying on the trade or 'business of wharfingers at East Smithfield in the county of 'Middlesex, under the firm and title of Downe, Bell, and Mit- 'chell.' The endurance was to be for seven years. June 24. 1829.

By the contract of the Shipping Company, (under which the above officers were constituted), it was declared that they were, 'in their respective departments, hereby constituted and appoint- 'ed commissioners and attornies for all and every other part- 'ners and partner of this Company, who, for their respective 'rights and interests, are hereby bound and obliged to perform, 'fulfil, and ratify every lawful contract, act, and deed of the 'said directors, trustees, manager, and agents, in their respective 'offices and departments, to all intents and purposes whatever.' The Company was not incorporated.

In 1814, and before the termination of the contract, the Ship- ping Company, alleging an inability on the part of Downe, Bell, and Mitchell, to perform the contract, refused to proceed with it; and these parties thereupon raised an action of damages be- fore the Court of Session against the Shipping Company. To that action they called as defenders the said 'John Pitcairn, 'Archibald M'Kinlay, Walter Gibson Cassells, James Reoch, 'Robert Scott, Thomas Miller, Robert Morton, William Fraser,

June 24. 1822. 'senior, and William Aitchison, defenders; and also Robert Liddell, manager at Leith for the said Shipping Company, for themselves, and for and on behalf of, and as taking burden on them for all the other partners of the said Edinburgh and Leith Shipping Company.' They had previously been described as office-bearers. The Shipping Company then brought an action libelling on the contract of 1809, alleging that Downe, Bell, and Mitchell, had failed to account posterior to 1813, and concluding for count and reckoning from that period. This action was at the instance of 'John Pitcairn of Pitcairn, merchant in Edinburgh, president of the Society or Company carrying on business at Leith, under the names and firm of the Edinburgh and Leith Shipping Company, Archibald MacKinlay, merchant in Edinburgh, first vice-president of that Company, William Gilchrist, also merchant in Edinburgh, second vice-president of that Company; and Robert Ogilvie, Walter Gibson Cassells, Thomas Jameson, Thomas Strong, and James Reoch, all merchants in Leith; James Carfrae, Alexander Henderson, John Manderston, John Crombie, Thomas Miller, Alexander Craig, and Peter Hill, all merchants in Edinburgh, directors of the aforesaid Company, and as such having power to institute and carry forth the action underwritten.' Reference was also made to the contract of the Shipping Company, constituting these persons office-bearers.

In defence it was pleaded, in limine, that as the Shipping Company were not a corporation, they were not entitled to sue by their office-bearers; and on the merits, that no balance was due. The preliminary defence was not insisted in at the debate; and a remit was made to an accountant, who reported that there was a balance due by Downe, Bell, and Mitchell, of L.843, 8s. 3d. Objections were lodged by them to this report, in which they stated, inter alia, that as previous to the contract libelled, one of their number, Mitchell, had acted as wharfinger of the Shipping Company, and that on the transactions with him there was a balance due to him, that balance ought to have been put to their credit, so as to give them the benefit of compensation. To this it was answered, 1st, That there was no action at the instance either of Mitchell or of the Company to constitute such a debt; 2d, That the counter-claim was illiquid and denied; and, 3d, That both on that account, and because there was no mutual concourse, the plea of compensation was incompetent. Lord Pitmilly approved of the report, and decerned against Downe, Bell, and Mitchell, for the above sum, 'under deduction of such sums as 'may be established to be due to them for commission or freights

'of goods shipped downwards, (being one of the items for which 'they claimed credit), on which allowed parties to be heard at 'next calling.'—To this interlocutor the Court, on the 29th January 1824, unanimously adhered.* Thereafter, Lord Mackenzie repelled the claim for commission, and of new decerned for the balance. This judgment was not reclaimed against to the Inner House; but Downe, Bell, and Mitchell, appealed against the interlocutors of Lord Pitmilly and of the Court. June 24. 1829.

Appellants.—1. The action is incompetent, having been brought by the office-bearers of an unincorporated association.

2. The accountant ought to have taken into consideration the state of accounts previous to the date of the contract; and the plea of compensation, founded on the debt due to Mitchell, ought to have received effect.

Respondents.—1. The appeal is incompetent. It is directed against an interlocutory judgment, which was adhered to unanimously, and no leave to appeal was obtained. The interlocutor contemplates further proceedings, and accordingly such proceedings took place. It was therefore plainly interlocutory.

2. The objection to the title is not well founded. The respondents sue in the capacity both of office-bearers, trustees, or attornies for the other partners, and for their own private interest. Besides, the appellants are barred from pleading the objection, because they contracted with the respondents in their character of office-bearers, raised an action against them in that capacity, and did not insist in the objection in the Court below.

3. The accountant had nothing to do with the transactions prior to the date of the agreement; and the plea of compensation being rested on a claim which is denied and illiquid, cannot be sustained.

Appellants (*in reply*).—The objection to the appeal is not well founded. The cause has been exhausted by a final judgment, and an appeal is competent against any of the interlocutors in the cause.

The House of Lords ordered and adjudged, that the interlocutors complained of be affirmed.

LORD CHANCELLOR.—My Lords, There is another case to which I would also call your Lordships' attention, which is the case in which Downe and others are appellants, and Pitcairn and others are respondents; which is an appeal from certain interlocutors of the Lord Ordinary and the Court of Session.

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* 2. Shaw and Dunlop, No. 622.

June 24. 1829. The facts of the case are these:—The Edinburgh and Leith Shipping Company was established in Edinburgh in the year 1802. At that period Messrs Downe and Company carried on the business of wharfingers in London, and the Edinburgh and Leith Shipping Company addressed their vessels to the wharf of Messrs Downe and Company, having appointed Mr Bell, who was a partner in that house, as their agent, for the purpose of managing their shipping concerns. It was the business of Mr Bell, as such agent, to collect the freights, and do the other business connected with an agency of this description. Mr Bell continued to transact this business till 1807, when, in consequence of some pecuniary embarrassments of an establishment with which he was connected, it was thought proper that he should retire from the agency, and that Mr Mitchell should be appointed to succeed him. Mr Mitchell was at the time a clerk in the house of Messrs Downe and Company. Early in 1809 he became a partner in this house; and after he became a partner in the house, he still continued to act as agent, up to the month of October in the year 1809: so that he acted as agent, being a clerk in the house, for the period of two years; he acted as agent, being a partner in the house, for the period of about nine months. In the month of October, in the year 1809, a new arrangement was come to;—a formal contract was entered into between the Edinburgh and Leith Shipping Company, and the firm of Messrs Downe, Bell and Mitchell, which was the name that was then given to the firm, consisting of those persons carrying on the business of wharfingers. The object of that contract was to fix, that for a certain time, I think the period of seven years, the vessels of the Edinburgh and Leith Shipping Company should be addressed to the house of Downe, Bell and Mitchell; and that during the same period the house of Downe, Bell and Mitchell, should act as agents for the Edinburgh and Leith Shipping Company. They accordingly commenced their agency at that period, under this agreement, and they continued that agency up to the month of February in the year 1814. At that period some disputes took place between the Edinburgh and Leith Shipping Company and Messrs Downe, Bell and Mitchell; and in consequence of these disputes the vessels were withdrawn from their wharf, and were addressed to another wharf, and the agency entirely ceased. Messrs Bell, Downe and Mitchell, in consequence of this alleged breach of contract, instituted some proceedings in the Courts of Scotland against the Edinburgh and Leith Shipping Company; and the Shipping Company, on their side, instituted in the Court of Scotland a suit of count and reckoning against Messrs Downe, Bell and Mitchell, for the money they had received in their character of agents. This last action is the subject of the present inquiry. When it came before the Lord Ordinary, Lord Pitmilly, he desired that the accounts should be referred to Mr Claud Russell, accountant, to investigate and examine them, and to make a report. Mr Claud Russell investigated those accounts, and the course in which he proceeded was this: He considered that he had nothing to

do with transactions prior to the commencement of this agreement— June 24. 1829.
he proceeded upon that principle, and made his report accordingly; and he reported that there was a balance of about L. 850 due from the wharfingers to the Shipping Company. Objections were made to the principle upon which that report was framed. It afterwards came under the review of the Lord Ordinary, who confirmed the view of the subject taken by the accountant. The subject was afterwards brought again under the review of the Court of Session, who confirmed the judgment of the Lord Ordinary; and the Court of Session were of opinion that the accountant had proceeded on correct principles. It is against these judgments that this appeal has been preferred to your Lordships' House. The principal object to which I think it necessary to call your Lordships' attention is with respect to the previous account of Mr Mitchell. Mr Mitchell was the agent who immediately preceded the agency of Messrs Downe, Bell and Mitchell. It was stated, and is alleged in these papers, that in that account between Mr Mitchell and the Shipping Company, credit had been given for a sum of L. 450 and upwards for freights, which had never been received by Mr Mitchell. It was contended, therefore, that that sum of L. 450 should be deducted from the balance which had been found due to the Shipping Company from Messrs Downe, Bell and Mitchell. The accountant and the Court below were of opinion, that no such deduction could be made in this case; that this was a suit brought in respect of transactions under a particular contract, commencing at a particular date, between particular parties, and that they had nothing to do with previous transactions between the Shipping Company and Mr Mitchell. On the other hand it was stated, that this account, commenced after the agreement had been entered into, was nothing more than a continuation of the old account, and that they were so blended together that they could not separate the one from the other; and that it would be doing great injustice to the parties, if they were to commence the account in the manner the accountant had commenced it at the period of October 1809. And for the purpose of shewing that the two accounts were blended together, they relied principally on this circumstance: Mr Mitchell, before he had given up the agency, had accepted bills to the amount of L. 2200; he had accepted bills on account of freights that had been received, or were expected to be received, and which bills were drawn upon him by the Shipping Company at Edinburgh: These acceptances, it was said, were paid by Messrs Downe, Bell and Mitchell, some of them, or the greater part of them, falling due after this agreement had been entered into; and it was said that these circumstances united and blended the accounts so together, that it became necessary to investigate the previous account, the account of the agency of Mr Mitchell. But, my Lords, it does not appear to me that the argument is well founded;—those acceptances were made by Mr Mitchell, who was the agent of the Shipping Company, in respect of freight he had received, or which he expected to receive; and being

June 24. 1829. his acceptances, he was bound to take them up. It does not, I think, appear, that the Shipping Company were informed in what mode the bills were taken up, or by whom they were taken up. They knew that the bills when they arrived at maturity had been paid. If, in point of fact, they were paid by money provided by Downe, Bell and Mitchell, for the credit of Mitchell, and if they chose to provide funds for their partner Mitchell, to enable him to take up the bills, that was an affair between them and Mitchell, and with which the Shipping Company had no concern. It does not appear to me, therefore, that that circumstance so blended and mixed the accounts together, as to render it necessary for the accountant to enter into the previous account.

But it was further stated, that there was a balance due to Mitchell—a balance of somewhat more than L.100—and that that balance was paid to Mitchell by Downe, Bell and Mitchell. But if so, it does not appear to me that that circumstance at all affects the present question. It was a sum due from the Shipping Company to Mitchell; and if the new agents, Downe, Bell and Mitchell, thought proper to pay that balance, they paid it as the agents of the Shipping Company, and were entitled to reimbursement for that sum as against the Shipping Company; and probably they did receive that sum from the Shipping Company. It does not appear to me, therefore, that there were any circumstances in this case so blending the accounts together, as to render it necessary for the accountant to go back beyond the period when the contract was entered into, namely, the month of October 1809. I am of opinion that he was perfectly correct in the course he pursued in the investigation of these transactions.

But then, my Lords, it was said, that Mitchell being one of the defenders, according to the laws of Scotland, if a sum of money was due to him, though the action was brought against him and two other persons—though a defendant certainly, according to the law of England, would not have been entitled—yet, according to the rule which prevails in Scotland, he was entitled to set off that particular debt against a claim made against him and his partners. Now it does not appear to me necessary to say any thing in respect of that as a general rule,—it is not necessary for me to advert to the authorities which have been cited for the establishment of that rule;—for it is not every claim which can be so set off—for, according to the authorities, the rule applies only to matters of liquidated debt, or matters admitting of immediate or ready liquidation; for if it be a disputed claim,—if, in order to ascertain the amount, litigation and contest will become necessary, they cannot be set off, or made use of for this purpose of compensation, in the Courts of Scotland.

My Lords, without referring to particular authorities in support of this position, I shall advert to a summary of those authorities in Mr Bell's work; and which summary is supported by the authorities themselves. Mr Bell says, 'In compensation the debts must both be 'liquid, or capable of immediate liquidation. A debt is deemed liquid

'when it is actually due, and the account ascertained "cum certum an June 24. 1829.
'et quantum debeatur." But if the debt itself be contested, and the 'creditor has not his proof ready,—or if the amount be disputed, and 'it depend on a long discussion what is to be adjudged due,—the 'debtor will not be allowed to avoid payment of what is liquid and 'due till that litigation be terminated.' Now no person can advert to the circumstances of this case, with respect to the state of this account, and not find himself compelled to come to this conclusion, that the amount due to Mr Mitchell—supposing any thing to be due to him—must of necessity be a subject of contest, and a subject of contest of a sufficiently complicated description. In order to ascertain what was due to Mr Mitchell, it would be necessary to go through the whole of his conduct, and to unravel every part of it; and there is this circumstance, that though the account of Mr Mitchell ceased in the year 1809, several years had elapsed before this question was agitated, and no claim had been made on the part of Mr Mitchell of any debt, or supposed debt, due from the Company to him. Under these circumstances I am of opinion, whatever may be the general principle in respect of set-off or compensation in Scotland, that this case comes within the exception stated by Mr Bell to the principle by which the Courts of Scotland are governed in allowing of compensation, and that the Court below were right in coming to the conclusion, that the set-off or compensation ought not to be allowed.

My Lords, there were various other objections in point of fact made by the accountant,—many claims were preferred which he disallowed. It is not my intention to trouble your Lordships, by going through all the long and complicated details with reference to this part of the case. I have read them with great care and attention; and I see no reason to dissent from the conclusion to which the accountant came on a consideration of those matters; which conclusion has been supported by the judgment of the Lord Ordinary, and by the subsequent judgment of the Court of Session.

I will state, however, to your Lordships one case, by way of example. A claim was made to some amount for a charge for printing carmen's notes and receipts. It was very properly stated, that it was the business of the agent, who received a commission, to make out those receipts himself; and that if he chose to get them printed, for the purpose of saving trouble to himself, that expense ought to fall upon him, and not upon his employers; but that which is the decisive answer to this demand, and most of the others under the same circumstances, is, that those wharfingers were in the habit every month of sending their account. That account contained, on the one side, the particulars of the freights which were due, and on the opposite side all the charges to which the wharfingers considered themselves entitled, and which they claimed by way of deduction, entering into the most minute and detailed particulars. The claim to which I have referred would naturally, if intended to have been

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made, have formed a part of the amount so deducted: But it did not; and the same observation applies to others, none of which were inserted in these monthly accounts. There is reason, therefore, to conclude from this circumstance, that all this was an after-thought, and that if this agreement had not been broken off in the manner I have stated, no such charge would in point of fact have been made.

I do not think it necessary to trouble your Lordships farther on this part of the case; but there was one item particularized at the Bar, as decisively calling upon your Lordships to allow this appeal—I mean the charge in respect of interest which the accountant had found due on the sum of L.850, the balance which appeared to remain due. He charged the interest upon that balance from the last day of January, when the agreement was broken off. It turned out, that at that period there were freights outstanding to the amount of upwards of L.1200. The interest was therefore incorrectly charged. The freights were in the course of gradual collection; and the greater part of the freights comprised in that L.1200 were collected in the course of one, two, three, and four months. If, therefore, we were to take an average, and suppose the whole collected in about two or three months, the receipt of some being earlier, and that of others later, it is obvious that the amount charged in the shape of interest would be a very minute and trifling sum, amounting only to a few pounds, and not of itself a subject of such importance as to justify your Lordships in remitting the case on that ground. But, my Lords, there was another observation made, and justly made, at the Bar, which was this, that it appears that these wharfingers, during the period of the transactions in question, had in their hands considerable balances belonging to the Shipping Company, and that if they were charged for interest upon those balances, that would amount to a much larger sum than that complained of. Under these circumstances, I conceive your Lordships will be of opinion, that no injustice has been done to these appellants, and that there is no ground to justify your Lordships in varying the judgment of the Court below. I should therefore, under these circumstances, recommend to your Lordships that this judgment be affirmed.

Appellants' Authorities.—(1.) Blackstone's Com. (Archbald's Ed. 1811.) vol. i. pp. 471-5.; Crawford, June 13. 1761, (1958.); Lawson, July 7. 1810, (F. C.)—(2.) Bogle, July 8. 1793, (2581.); Handyside, Dec. 1. 1812, (F. C.); Scott, June 13. 1809, (F. C.); Russell *v.* M'Nab, May 26. 1824, (3. Shaw and Dunlop, p. 63.); Salmon, Dec. 17. 1824, (3. Shaw and Dunlop, p. 406.)

Respondents' Authorities.—2. Bell, (128. 619.); 3. Erak. 4. 16.

SPOTTISWOODE and ROBERTSON—A. MUNDELL,—Solicitors.

WALTER ROSS and HENRY ANDERSON, (Representative of WILLIAM ANDERSON), Appellants.—*Scarlett—Maitland.* No. 34.

Mrs HENRIETTA LOCKHART or WILSON and Husband, and the Trustees of the deceased Mrs ANN LOCKHART and her Husband.—*Murray—Campbell.*

AND

Sir COUTTS TROTTER, and Others, Trustees of the late COLIN M'KENZIE, CHARLES G. URQUHART, and Others, Respondents.—*Miller.*

Tutor and Curator—Discharge.—Held, (affirming the judgment of the Court of Session), 1. That a discharge of an heritable bond by tutors, after the expiration of the tutory, is not valid; and, 2. That the tutors granting such a discharge, are liable to repay the amount of the bond to the party to whom they had granted the discharge, and against whom the bond has been revived.

June 24. 1829.

1ST DIVISION. Lord Medwyn.

CHARLES LOCKHART, Esq. had three daughters, Henrietta, Ann, and Jane. The two former were twins, and were born in June 1802; the latter was the youngest of the family. In September 1803, Mr Lockhart executed a mortis causa trust-deed in favour of Mr Walter Ross and the late Mr William Anderson. This deed contained the usual clauses, exempting the trustees from personal responsibility, except for actual intromissions; but it did not contain any nomination of guardians to the children. Mr Lockhart died in 1804; and on the 3d of February 1805 Mr Ross was appointed by the Court of Session factor loco tutoris to the children. Thereafter, on the 2d of June 1808, a gift of tutory was obtained from Exchequer, in favour of Mr Ross, Mr William Anderson, Sir Charles Ross, Mr William Henry Anderson, Mr Charles Gordon Urquhart, and the mother, Mrs Lockhart. By that deed they were named 'tutores dativos et administratores dict. Henriettæ Lockhart, Annæ Lockhart, et Jeanniæ Lockhart, duran. toto spatio annisque earum respectivarum pupillaritatum ullis tribus. eorum, in vicecomitatu de Ross residen. lie a quorum existen. pro administratione,' &c. In 1810 these persons, in their character of tutors, lent L.3000 of the money belonging to the pupils to David Urquhart, Esq. of Braelangwell, for which he granted an heritable bond over his estate, and bound himself to repay it 'to the said Henrietta Lockhart, Ann Lockhart, and Jean Lockhart, their heirs, &c. or to their said tutors above named and designed, or their quorum,' &c. Infeftment was taken in these terms.

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Soon thereafter Jane died in pupillarity, and was succeeded by her two sisters. They attained the age of twelve in June 1814, and afterwards made up titles to their sister's share of the bond by precept of clare constat.

The debtor, Mr Urquhart, having died, his son (who was one of the tutors) brought an action of ranking and sale of the estate, as heir-apparent, in which a claim was lodged by the tutors in virtue of the bond. Under this process, Sir Coutts Trotter and others, as trustees of the deceased Colin M'Kenzie of London, purchased part of Braelangwell; and by an interim decreet of division, dated 15th June 1815, they were ordained to pay to the Misses Lockharts, or their tutors, the principal sum, and interest, amounting to about L. 3500. An arrangement was then entered into by the tutors, to lend this sum to Mr M'Kenzie of Newhall, on an heritable bond over part of his estate. The same agents who acted for Sir Coutts Trotter and others, also acted for Mr M'Kenzie of Newhall. The transaction was concluded in August 1815, by these agents paying, on behalf of Sir Coutts Trotter and others, into the British Linen Bank, the above sum, on account of Mr M'Kenzie of Newhall. At the same time, a discharge, disposition, and assignation of the bond and sasine, (which proceeded in name of all the tutors, and acknowledged receipt by them of the money), was subscribed by Mr Ross and Mr William Anderson, and a duplicate by William Henry Anderson, in their character of tutors; but it was not subscribed by any of the others. This deed contained an obligation of warrandice against the facts and deeds done, or to be done, by the tutors, or the Misses Lockhart. An heritable bond, with sasine, was then obtained from Mr M'Kenzie, in the same terms as the previous one. At the time when the money was paid into the British Linen Bank, Mr M'Kenzie was indebted to it in a sum of greater amount; and it was applied by the Bank in extinction pro tanto of their debt. He afterwards became insolvent, and executed a trust-disposition for behoof of his creditors. The heritable bond in favour of the Misses Lockhart was ultimately found not to be a sufficient security for the sum lent. One of these ladies married the Reverend William Wilson, curate of Soham, and the other Dr John Argyll Robertson of Edinburgh, under whose contract of marriage trustees were appointed. An action of reduction was then brought by them against Sir Coutts Trotter and others, as trustees of Mr Colin M'Kenzie, and against Mr Urquhart, and Mr M'Kenzie of Newhall, concluding to have the discharge

set aside, the original heritable bond restored, and to have it declared an effectual security over the estate of Braelangwell. An action of relief was thereupon raised by Sir Coutts Trotter and others, against the appellants, Mr Ross and Mr Henry Anderson, (as representing Mr William Anderson), and also against Mr William Henry Anderson. June 24. 1829.

Various conflicting statements were made by the parties, as to the circumstances under which the money had been paid, and various pleas were raised; but it was admitted on all hands that the discharge had been granted after the tutory had expired; and the ultimate judgment proceeded on this ground alone.

The Lord Ordinary having reported the case, the Court, on the 15th December 1826, decerned in terms of the conclusion of the action of reduction, 'but with this restriction, that the 'heritable security by the late Mr Urquhart, and sums of money 'therein contained, are, and must continue to be, a real burden 'and effectual security, affecting only that part of the lands and 'others contained in the heritable bond, and other writings, 'which was acquired by the trustees of Colin M'Kenzie;' found these parties liable in expenses; and in the action of relief, decerned in terms of the libel, with expenses.*

Ross and Anderson appealed, but Sir Coutts Trotter, and others, did not. In their pleading before the House of Lords, the appellants contended chiefly, that as they had been appointed trustees under the deed of 1803, and as they were liable only for actual intromissions, they could not be made responsible for the insolvency of M'Kenzie of Newhall. To this it was answered, that they had acted throughout as tutors, and not as trustees, and therefore could not now assume that character.

The House of Lords ordered and adjudged, that the interlocutors complained of be affirmed.

LORD CHANCELLOR.—My Lords, in this case it is perfectly clear that the authority of the tutors dative had expired at the period of the transaction in question. The deed of discharge, disposition and assignation, is in consequence altogether invalid, and it follows therefore that the action of reduction ought to be sustained. I should recommend to your Lordships, therefore, upon that branch of the case, to affirm the judgment of the Court of Session. It was argued at the bar, that these parties were acting under the trust-deed of the year 1803; but that view of the case is entirely inconsistent with all the

* 5. Shaw and Dunlop, No. 87. p. 136.

June 24. 1829. circumstances of the transaction. Two only of the parties out of the three were trustees,—William Henry Anderson was not a trustee. It appears that the money was advanced by these parties, and the obligation taken by them as tutors. It further appears, that the discharge was given to them in their character of tutors; and throughout this transaction, in every part of it, they appear to have acted in their character of tutors. This view of the case taken at the bar, cannot I think be supported, and the correct course will be to affirm the judgment of the Court of Session.

With respect to the action of relief, it appears to me that the decision of that follows as a consequence from the other. The money was paid under an authority which turns out to be altogether invalid. It was paid on a consideration which has entirely failed. The parties represented themselves, when this money was advanced, as clothed with an authority which in point of fact they did not possess. It appears to me, consequently, that the parties who are the pursuers in this action are entitled to the relief which they seek. I should recommend to your Lordships, therefore, that the judgment of the Court below in this action of relief should also be affirmed.

LE BLANC, OLIVER, and COOK—SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNELL,—Solicitors.

No. 35. ALEXANDER RITCHIE, Appellant.—*Lushington—Hunter.*

JOHN MACKAY, Respondent.—*Spankie—Napier.*

Bill of Exchange—Oath.—The Court of Session having found, that a reference to the oath of the drawer of a bill was incompetent, in respect that he had been convicted of a crime inferring infamia juris;—the House of Lords found it unnecessary to pronounce any judgment on that question, but that under the circumstances the reference had been properly rejected.

June 24. 1829.
2D DIVISION.
Lord Cringletie.

ON the 4th of March 1817 the appellant, Alexander Ritchie, accepted a bill drawn on him by his brother, James Ritchie, for L. 250, payable three months after date. The bill was discounted by the drawer with the Commercial Banking Company, and was dishonoured when it fell due on the 17th June. He held two shares in the Bank; and on the same day desired the manager of the Bank to pay the bill from the proceeds of the shares. This was declined. On the 18th of August he executed a conveyance of all his effects to a trustee for behoof of his creditors, and afterwards attempted, unsuccessfully, to get the benefit of the cessio. On the 18th or 25th November the respondent, Mackay, (who alleged that he was a creditor of the drawer to a

large amount), paid the bill, and obtained an assignation from the Bank. He then gave the appellant a charge of payment as accepter of the bill, against which the appellant immediately presented a bill of suspension, on the ground that Mackay was not an onerous bona fide holder, and offering to prove, by the oath of the drawer, that no value had been paid for the bill. The bill of suspension was passed; and a litigation then ensued, as to whether Mackay was entitled to the privileges of an onerous bona fide holder. The Court, on the 29th of May 1823, found that he was not so. Thereafter Mackay was authorized by the creditors to carry on the action for their and his own behoof. June 24. 1829.

In the meanwhile (21st of April 1818) the drawer was convicted before the Court of Justiciary of fraud, falsehood, and wilful imposition, and sentenced to be imprisoned for one year. The appellant having made a reference to his oath that he had paid no value for the bill, Mackay objected, 1. That, as the drawer was the brother of the appellant, was bankrupt, and in collusion with him, a reference to his oath was not competent so as to affect creditors; and, 2. That as he had been convicted of a crime inferring legal infamy, a Court of law could not receive nor give effect to his oath. The Lord Ordinary issued this note:—

'The Lord Ordinary has advised this minute of reference to the 'oath of James Ritchie, with answers thereto, which object to 'the competency of an oath on this occasion by James Ritchie. 'It is said, 1*st*, That he is the brother of the suspender in this 'case, and that he is in collusion with the suspender; and, 2*d*, 'That there can be no dependence on his oath, as he has been 'found guilty, by the verdict of a jury, of fraud, falsehood, and 'wilful imposition, and that he has been accordingly punished 'by a sentence of the Circuit Court of Justiciary: that if he had 'been adduced as a witness, in this or any other cause, he would 'have been inadmissible; and therefore, as this is a question at 'the instance of a trustee for his creditors, his oath cannot be 'admitted to defeat their right. The suspender (appellant) has 'not been heard in reply to these answers, owing to avizandum 'having been made with the cause; and the Lord Ordinary 'thinks that it is right to afford the suspender that opportu-'nity, the question being at the instance of a trustee for credi-'tors, and arising on a bill due by the suspender to his brother. 'The oath referred to is not exactly that of a witness, but 'it is very similar to it; for the trustee for his creditors being 'the pursuer or charger, the point at issue is to be deter-'mined by James Ritchie's oath, who really is evidence for his

June 24. 1829. 'brother. It is in consequence too of the equitable powers of 'the Court that they permit any oath of reference to be taken; 'for, in strict law, a bill is evidence of a debt; but where the 'Court has just reason to apprehend that truth will not be ob- 'tained by such an oath, it has in many cases refused to permit 'the oath to be taken. The Lord Ordinary's idea is, that this 'case should go before the Court on short Cases; but he desires 'that the record shall first be closed, so far as that the parties 'shall declare that they have no other written evidence to pro- 'duce, and that they rely on what is in process.' Thereafter his Lordship reported the cause to the Court on Cases; and their Lordships, after being equally divided in opinion, and having resumed consideration, found, 'In respect that James Ritchie 'was convicted, and received sentence for a crime which ren- 'dered him infamous, that the proposed reference to his oath is 'incompetent; and remitted to the Lord Ordinary to proceed 'accordingly, and to determine all questions as to expenses.'* The Lord Ordinary thereupon repelled the reasons of suspension, and found expenses due.

Ritchie appealed.

Appellant.—1. As it has been decided that the respondent is not entitled to the privilege of an onerous bona fide holder, the appellant was entitled from the outset to refer to the oath of the drawer. He accordingly made an offer to that effect before the conviction of the drawer, and was only prevented from getting the benefit of the oath by the litigious conduct of the respondent. He ought not, therefore, to be placed in a worse position than he was at the time of making that offer.

But, 2d, There is no foundation for the objection rested on the plea of infamia juris. This may disqualify a person from acting as a witness or a juror, but not of deponing on a reference to oath. Such a reference is a contract, and a person who has been convicted even of an infamous offence can effectually contract. Besides, the sentence for the crime has received entire execution.

3. Neither is the plea rested on the bankruptcy available to the respondent. It has been found that he is not an onerous bona fide holder, and therefore he is identified with the drawer. But the drawer could not state either his own bankruptcy or infamy as an objection to a reference to his oath. Even in a question with

* 4. Shaw and Dunlop, p. 534.

creditors such a reference is competent; whereas, in this case, the appellant is not claiming on the estate, but is resisting a claim made against him. June 24. 1829.

Respondent.—1. The respondent sues on behalf, not of the drawer, but of his creditors; and although he individually has been found not entitled to the privileges of an onerous bona fide holder, yet, on behalf of the creditors, he is entitled to state objections which may not be competent to the drawer himself. The plea rested on the offer to refer to oath prior to the conviction, is irrelevant. The question must be decided as at the time when the reference is actually made. Many supervenient circumstances may deprive one of the power of referring to oath,—*e. g.* the death of the party; and it would be no reason for giving effect to the defence proposed to be verified, that after reference, but before the oath was emitted, the party had died.

2. The drawer having been convicted of an offence inferring infamy, no Court can give credit to his testimony; which is just in other words saying, that his statement on oath cannot be listened to or received. Nothing can do away the infamy except the King's pardon; and it is of no importance that the sentence of imprisonment has received effect.

3. But under the peculiar circumstances of this case,—the parties being brothers,—confessedly raising money by accommodation bills,—and the drawer being bankrupt, and having been refused the benefit of the cessio, and convicted of an infamous offence,—and the two brothers being evidently colluding to defraud the creditors, the reference ought not to be permitted.

The House of Lords pronounced this judgment:—

'It is declared that this House does not think it necessary, for 'the decision of this case, to determine whether by the law of 'Scotland reference to the oath of a party is incompetent by 'reason of his having been convicted, and having received sen- 'tence for a crime, which renders him infamous, and would ren- 'der him incompetent as a witness; but the Lords find, that, un- 'der the particular circumstances of this case, such reference was 'properly refused; and it is therefore ordered and adjudged, 'that the interlocutors complained of be affirmed.'

Lord Chancellor.—My Lords, In the case of Ritchie against Mackay, which was argued some time since at your Lordships' Bar, the facts of the case were shortly these—at least as far as it is neces-

June 24. 1829. sary for the purpose of raising the only question on which I think any doubt can reasonably be entertained:—A person of the name of James Ritchie, who was brother of Alexander Ritchie, the appellant, drew a bill upon his brother to the amount of L. 250; which bill was accepted by Alexander Ritchie. This bill was discounted by James Ritchie with the Commercial Bank of Scotland, James Ritchie at that time possessing shares in that Bank. When the bill became due it was dishonoured; and four or five months afterwards was taken up by Mackay, the respondent. The circumstances under which this bill found its way into the possession of Mackay, the respondent, were such as to render it a material point to ascertain whether or not there was value given by James Ritchie to Alexander Ritchie for the acceptance; and the only material point for consideration is this,—whether or not such value passed?

Now, my Lords, it appeared upon the face of the bill that the bill was accepted for value; and there was no written document in the possession of the party, Alexander Ritchie, for the purpose of opposing what appeared upon the face of the bill. It was contended, however, on the part of Alexander Ritchie, that he was entitled in this case to have the benefit of the drawer's oath, and a reference was made in the usual way to the oath of the drawer; and the question turns entirely upon that reference, under the particular circumstances to which I am about to advert. This transaction took place as far back as the year 1817. Shortly afterwards a proceeding was instituted against James Ritchie, the drawer of the bill, in consequence of certain fraudulent transactions in which he had been concerned. James Ritchie had negociated in Scotland two several bills, with fictitious names upon those bills, which, according to the law of England, would be forgeries. He was concerned in uttering those bills in Scotland, knowing that the names were the names of fictitious persons, and thereby committing a gross fraud;—he was prosecuted for the fraud which he had so committed, found guilty, and sentenced to one year's imprisonment; and it was contended, under these circumstances, on behalf of Mackay, the respondent, that it was incompetent to make a reference to the oath of James Ritchie,—that he was, in consequence of these circumstances, and of his conviction of this fraud, rendered incompetent as a witness in a Court of justice, and incompetent also to have an oath tendered to him for the purposes to which I have adverted. It was contended, on the other side, that the offence was not to be considered as a crimen falsi; and that even if he would, in the first instance, have been rendered incompetent, still, by having undergone the sentence of the law, his competency was restored. These were the two primary objections which were made.

Now, with respect to the first question, no reasonable doubt can be entertained, that the offence of which he was guilty ranged itself under the denomination of the crimen falsi,—it was in the true sense of the word a forgery. He knew the names to be fictitious,—he issued

the bills knowing that the names were fictitious,—he issued them for the purpose of fraud, and he consummated that fraud;—it is impossible that an instance more strong, as ranging itself under the denomination or description of the crimen falsi, could be mentioned;—upon that point, therefore, it appears to be impossible any doubt can be entertained. June 24. 1829.

The next question for consideration is, whether, as he has undergone the sentence of the law, his competency is restored according to the law of Scotland. I understand the disqualification to be perpetual, unless it is removed by a pardon from the Crown. It was so decided in the year 1815, in a case reported in the Faculty Collection of Cases, the case of Black v. Brown; which case afterwards came under the consideration of Lord Pitmilly in the year 1825, and he recognized and adopted that decision. No contrary decision is to be found; and I think we are entitled to assume, that, according to the law of Scotland, the mere circumstance of the party having gone through the punishment imposed upon the crime, does not remove his disqualification, and that it can be removed only by a pardon from the Crown. Under these circumstances, therefore, if James Ritchie had been tendered as a witness, I apprehend it is perfectly clear that he would have been incompetent,—that his testimony as a witness would not have been received.

But, my Lords, in this case he was not tendered as a witness; and I beg now, therefore, in the first place, to suggest, that I entertain very great doubt, as to whether or not an objection of this kind can be made as a general objection, where a reference is made to the oath of the party. I shall take this in its most simple form,—I shall suppose this to have been a proceeding, in which Ritchie the drawer was the plaintiff, in a suit against Alexander Ritchie the accepter: it does not appear to me that there is any sufficient reason, under such circumstances, and in that state of facts, to say that Alexander Ritchie, the defendant, in such a suit, would have been deprived of a right to make his appeal to the oath of the plaintiff, merely because the plaintiff had become incompetent as a witness as between third persons, in consequence of his having been convicted of the crimen falsi. There is no authority that has been cited for the purpose of establishing such a position; and I see no sufficient ground on which it can be rested, as between two parties in a Court of justice who are contending against each other. It does not appear to me, that there is any reason why, because one person has committed a crime which would render him incompetent to give evidence, the other should be deprived of the benefit the law gives him, if he chooses to avail himself of the benefit of resting his case on an appeal to the oath of his adversary. It is true that the appeal, under such circumstances, is not likely to be advantageous; but that is for the consideration of the party making the appeal; and in the absence therefore of all authority I should say, in that state of facts to which I have adverted, namely, where one of the litigating parties in the suit was a person who had committed a

June 24. 1829. crime, and whose incompetency as a witness was declared, his adversary would not be deprived of the right of appealing to his oath. The only ground which has suggested itself to me for sustaining the objection is, that a Court of justice under such circumstances might think they ought not to tender an oath to a party who had become infamous in consequence of the conviction of a crime.

My Lords, a similar rule of law applies in this country as to the evidence of persons convicted of certain crimes, who are thereby rendered incompetent witnesses in a Court of justice; but there are many cases in which an oath may be tendered to a party so situated—not an oath to him as a witness, but an oath under other circumstances. It does not appear to me, therefore, in this situation of things, that if James Ritchie had himself been the plaintiff in the suit, it would have been incompetent to Alexander Ritchie to put him to his oath. But, my Lords, that is not the state of things in this case; and it is observed by the Lord Ordinary in giving his judgment, that it is in a considerable degree in the discretion of the Court whether or not they will allow the oath to be tendered; and I find, in referring to Mr Bell's book upon the same subject, he also lays down as the law of Scotland, (and which I believe cannot be questioned), that it is not imperative upon the Court, under all circumstances, to allow the oath to be put, but that the Court, this being an appeal to the equitable consideration of the Court, has a right to exercise a discretion upon the subject; and if they see reason to believe that justice is likely to be perverted by the administration of an oath of that description, they will not give authority for the oath to be administered.

My Lords, in order that I may not be mistaken with respect to this doctrine, I will refer to the language of the Lord Ordinary, to which I beg leave to say, that on consideration I entirely subscribe. He says, 'It is in consequence of the equitable powers of the Court 'that they permit any oath of reference to be taken; for in strict law 'a bill is evidence of a debt; but where the Court has just reason 'to apprehend that truth will not be obtained by such an oath, it has 'in many cases refused to permit the oath to be taken.' Now, my Lords, let us consider what is the situation of the parties in this case. James Ritchie is a bankrupt,—a bankrupt under such circumstances that he has only a mere nominal interest in the success of the pursuer in this action;—it is obvious, therefore, that if the oath is tendered to him, he stands substantially in the situation of a witness,—he stands substantially, and gives his evidence almost in the character of a witness;—not in the situation of a witness in strict law, but in that situation in point of effect. Now, what is his situation? He stands in the relation of a brother to the party who claims the benefit of his oath, in addition to which he is wholly unworthy of credit, in consequence of the conviction of the crime of which he has been accused, and of which he has been found guilty. I should say, under these circumstances, my Lords, referring to the doctrine to

which I have adverted, that the Court would exercise a sound discretion, in a case of this description, in saying, that Alexander Ritchie ought not to be permitted to rest the case on an appeal to the oath of his brother. June 24. 1829.

My Lords, the result of what I have stated will be in substance to affirm the judgment of the Court below;—the only doubt that has occurred to me has been with respect to the terms in which that judgment has been pronounced. The judgment of the Court below is in these terms: 'In respect that James Ritchie was convicted 'and received sentence for a crime which rendered him infamous, 'find, That the proposed reference to his oath is incompetent; and 'remit to the Lord Ordinary to proceed accordingly, and to deter-'mine all questions as to expenses.' Substantially, I should recommend to your Lordships to affirm the judgment; but I am apprehensive, if it is affirmed precisely in the form in which that judgment is pronounced, it may be considered that the Court below meant to lay down as a general rule, and that this House has concurred in the opinion, that where a party had been convicted of a crime which rendered him infamous, under no circumstances, and between no parties, could reference be made to his oath; and I apprehend your Lordships would not be disposed, at least unnecessarily, for it is unnecessary to the decision of this case, to lay down such a doctrine. For the purpose, therefore, of avoiding such a conclusion being drawn from the terms in which this judgment is pronounced, although I should recommend to your Lordships to affirm the judgment in substance, I should suggest at the same time that some alteration should be made in the terms in which the interlocutor is conceived;—that particular alteration I shall take the liberty, on a future day, of submitting to your Lordships.—Ordered accordingly.

Appellant's Authorities.—(2.) Elchies, No. 7. voce Member of Parliament.—(3.) 2. Bell, 512.; 4. Ersk. 2. 21.; Halkerston, Feb. 26. 1783, (12,476).

Respondent's Authorities.—(2.) Burnet, 396.; 4. Ersk. 2. 23.; Black, Dec. 22. 1815, (F. C.); Smith v. Knowles, (Jury Court, 1824).—(3.) 1. Bell, 253.; Tait's Law of Evidence, p. 279.

ANDREW M'CRAE—JAMES DUTHIE,—Solicitors.

CHARLES CUNNINGHAM and CARLYLE BELL, Town-Clerks of Edinburgh, Appellants.—*Sol.-Gen.* (*Tindal*)—*Adam.* No. 36.

HUGH VEITCH, Town-Clerk of Leith, Respondent.

Public Officer—Town-Clerk—Exclusive Privilege.—Held, (ex parte, reversing the judgment of the Court of Session), That the right to receive the fees and emoluments of preparing charters, precepts of clare constat, and other feudal writs granted to

or by the Magistrates of Edinburgh, relative to subjects situated within the burgh of barony of South Leith, and of which the superiority had been acquired by the Magistrates posterior to 1565, is not necessarily incident to the office of clerk of South Leith; but although he had shewn a prima facie case of the right to draw them, yet it was competent for the town-clerks of Edinburgh to prove either a direct authority given by the superiors to them to draw them, or such usage as necessarily inferred such authority.

June 24. 1829.

1st Division. Lord Eldin.

MR VEITCH, as clerk of the burgh of barony of South Leith, under a commission granted to him by the Magistrates of Edinburgh, the superiors, which conferred on him 'the same fees, 'profits, emoluments, and casualties thereto belonging, which 'his predecessors did, might, or could enjoy,' brought an action against the appellants, the town-clerks of Edinburgh, setting forth, 'that, in virtue of the said office of clerkship thus conferred 'upon him, the pursuer has the sole right to prepare all original 'charters, or charters by progress, precepts of clare constat, and 'other feudal writings, deeds or instruments, granted by or to 'the Lord Provost, Magistrates, and Council of the said city, as 'representing the community thereof, of property situated within 'the town of South Leith and liberties, privileges and pertinents 'thereof; and to receive all the fees, profits, emoluments, and 'casualties arising from this department of his office. That the 'present Lord Provost, Magistrates, and Council of the city of 'Edinburgh, and their predecessors in office, have, for several 'years bypast, permitted those rights and privileges belonging 'to the pursuer to be greatly encroached upon by the principal 'clerks of the said city, who have assumed the power of prepar-'ing many of those deeds and instruments, and of appropriating 'to themselves the fees and emoluments thereof,—and the pur-'suer has in consequence been deprived of the fees, profits, emolu-'ments, and casualties arising therefrom:' He therefore concluded to have it found and declared, 'that the pursuer, as clerk of 'South Leith, has the sole and undoubted right to prepare and 'to receive the fees, profits, emoluments and casualties, for all 'charters, both original and by progress, all precepts of clare 'constat, and all other feudal writings, deeds, and instruments of 'every description, to be granted to or by the Lord Provost, 'Magistrates, and Council of the city of Edinburgh, and their 'successors in office, of property situated within the town of 'South Leith, and liberties, privileges, and pertinents thereof.'

In defence the appellants stated, 'that the precise rights and 'privileges of the clerk of Leith, as opposed to those of the town-'clerk of Edinburgh, have been fixed and settled by long usage.

'He enjoys, within the town of South Leith, the right and privi- June 24. 1829.
'lege of preparing all renewals of investitures, whether in favour
'of heirs or singular successors, in every case where the property
'was feued out prior to the period when the superiority was ac-
'quired by the Magistrates of Edinburgh. But, in so far as re-
'gards original grants since that period, and the renewals of such
'original grants, it has been the right and privilege of the town-
'clerks of Edinburgh, as well in virtue of their office as by long
'and uniform usage, to prepare all such; and, therefore, the de-
'claratory conclusions in the pursuer's summons are by far too
'broad, and ought to be limited in the manner now mentioned.'
After some preliminary procedure, Lord Eldin pronounced this interlocutor: 'Finds that the pursuer, as town-clerk of South
'Leith, has the sole and undoubted right to prepare and receive
'the fees, profits, emoluments, and casualties, of all renewals of
'investitures, whether in favour of heirs or singular successors,
'of property situated within the town of South Leith, and liber-
'ties, privileges and pertinents thereof, in every case where the
'property was feued out prior to the period when the superiority of
'South Leith was acquired by the Magistrates of Edinburgh; and
'decerns and declares accordingly: quoad ultra assoilzies the
'defenders from the conclusions of the summons, and decerns.'
Veitch having reclaimed, the Court, after appointing him to lodge a condescendence of the boundaries of the burgh of Leith, pronounced, on the 16th May 1826, this judgment:—
'Recall the interlocutor of the Lord Ordinary reclaimed against,
'in so far as applies to the case of the town-clerks of Edinburgh:
'Find that the petitioner, as town-clerk of the burgh of barony
'of South Leith, has the sole and undoubted right to prepare
'and receive the fees, profits, emoluments, and casualties, for all
'charters both original and by progress, all precepts of clare
'constat, and all the feudal writings, deeds and instruments of
'every description, to be granted to or by the Lord Provost,
'Magistrates, and Council of the city of Edinburgh, and their
'successors in office, of subjects situated within the said burgh
'of barony of South Leith, according to the boundaries thereof,
'as now fixed and ascertained, so far as concerns the rights of
'parties in this process, by the mutual minutes in process,—the
'superiority of which subjects the said Lord Provost, Magis-
'trates, and Council, hold in virtue of their rights to the supe-
'riority of the said burgh of barony, and as part of the said burgh
'of barony, excepting the King's work, and the subjects within
'the aforesaid boundaries, the superiority of which was not com-

June 24. 1829. 'prehended within the titles in favour of the said city of Edin-
'burgh to the superiority of the said burgh of barony, but was
'acquired by the city of Edinburgh by titles different from those
'by which they acquired and hold the town of South Leith, links,
'and pertinents; with regard to which acquisitions the Lords find,
'that the petitioner has no right, and does not claim the privi-
'lege to prepare the investitures thereof, and decern and declare
'accordingly: Find no expenses due to either party.' *

Cunningham and Bell appealed; but no case was lodged, nor appearance made for Veitch.

Appellants.—There are certain duties, peculiar to the clerk of every burgh, which can be exercised by no other person; and he is entitled to the emoluments arising out of the performance of these duties. The appellants, therefore, do not dispute that the respondent is entitled to the profits arising out of his proper office, as clerk of Leith. But the question here is, whether, as town-clerk, he is entitled exclusively to prepare all the charters, precepts of clare constat, and other feudal writings granted to or by the Magistrates of Edinburgh, in relation to subjects situated within the burgh of barony of South Leith. The appellants maintain, that, as clerk, he has no such exclusive right. It is in the power of the Magistrates, like any other proprietor or superior, to employ any man of business they think fit. The property over which they are superiors is not burgage, and the superiority forms part of the private estate of the city of Edinburgh. But there is nothing in the commission granted by the Magistrates to the respondent, which bestows on him such an exclusive right. Neither has he any title arising out of immemorial usage, except to the limited extent admitted in the defences. The appellants were ready to have shewn in the Court below, that no such usage existed; and although it was incumbent on the respondent to have proved the existence of the usage, yet no proof on the subject was allowed. Neither is there any such usage in regard to other burghs of barony;†

* 4. Shaw and Dunlop, No. 371.

† On this point the appellants stated, that by accurate inquiries they had ascertained, 1*st*, That in 30 burghs of barony, the charters and other feudal writings, granted by the respective superiors, of property situated within their limits, are not prepared by the town-clerks at all, but by other men of business appointed by the superiors. 2*d*, In two burghs of barony, the town-clerk is in use to prepare a certain class of the charters, &c. granted by the superiors, but not the whole of them. 3*d*, As to the remainder of

and the appellants were able to have proved, that the town-clerks of Edinburgh have uniformly enjoyed the privilege of preparing original grants flowing from the Magistrates subsequent to 1565, when the superiority was acquired by the Magistrates; but this was not permitted by the Court below to be proved. June 24. 1829.

The House of Lords pronounced this judgment:—'The Lords 'find, that the right to prepare charters, and other writings of 'the description mentioned in the said interlocutor of the 16th 'May 1826, and to receive the fees, profits, and emoluments 'and casualties thereof, is not necessarily by law incident to the 'office of town-clerk of a burgh of barony, such as that of South 'Leith; but that, under the circumstances of this case, the Lords 'are of opinion, that there is a prima facie case established in 'favour of the claim of the town-clerk of South Leith; and that 'the town-clerks of Edinburgh are entitled to shew, on their side, 'that the said fees, profits, emoluments and casualties, and the 'right to prepare the said charters and writings, belong to them, 'either by the proof of some direct authority for that purpose 'given to them by the persons entitled to the superiority, or by 'evidence of long and continued usage, from which such autho-'rity may be legitimately inferred; and it is therefore ordered 'and adjudged, that such parts of the interlocutors appealed 'from as are inconsistent with the above findings be reversed: 'And it is further ordered, that the cause be remitted back to 'the Court of Session, to do farther therein as may be consistent 'with the above findings, and this judgment, and as may be just.'

Lord Chancellor.—My Lords, There is a case which stands for the judgment of your Lordships; a case in which Charles Cunningham and Carlyle Bell, who are described as writers to the signet, and conjunct town-clerks of the city of Edinburgh, are the appellants; and Hugh Veitch, town-clerk of Leith, is respondent. This, my Lords, is an appeal from certain interlocutors pronounced by the Court of Session in proceedings originally instituted by Mr Veitch, as town-

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the burghs of barony, the appellants have no certain information; but in the course of the whole of their inquiries on the subject, they have not been informed of any instance in which the town-clerk prepares the whole of the feudal deeds flowing from the superior, with the single exception of the burgh of barony of Paisley. It ought to be explained, however, that Paisley stands in a particular situation. It held originally of the Church, and the superiority was afterwards acquired by the Magistrates of the burgh, for the community. Hence the Magistrates themselves grant the investitures, and are naturally led to employ their own clerk in preparing them.

June 24. 1829. clerk of South Leith, for the purpose of establishing his right 'to 'prepare and receive the fees, profits, emoluments and casualties, for 'all charters, both original and by progress, all precepts of clare 'constat, and other feudal writings, deeds, and instruments of every 'description, to be granted to or by the Lord Provost, Magistrates, 'and Council of the city of Edinburgh, and their successors in office, 'of property situated within the town of South Leith, and the liberties, 'privileges, and pertinents thereof.' This was the object for which the suit was instituted by the town-clerk of South Leith.

It appears that South Leith is a burgh of barony, the superiority of which belonged, in the 16th century, to a person of the name of Logan. In the year 1555 that superiority was sold to the Crown of Scotland, and about ten years afterwards, in the year 1565, the superiority was again transferred by the Crown of Scotland to the city of Edinburgh. The city of Edinburgh has held that superiority from the year 1565 down to the present time; and, as being the superiors, the Provost, Magistrates, and Council of the city of Edinburgh, have from time to time appointed the town-clerk of South Leith. The appointment of the present town-clerk of South Leith is in the terms I shall read to your Lordships. It appears that he paid the sum of L. 1200 for the office, and the appointment was,—'We hereby elect, 'nominate, and appoint the said Mr Hugh Veitch to be clerk of South 'Leith, and that ad vitam aut culpam, hereby giving and granting to 'him the same fees, profits, and emoluments and casualties thereto 'belonging, which the said Mr John Pattison, or any of his predeces-'sors in the said office, did, might, or could enjoy; and with power to 'appoint a deputy.' It appears also that the terms of the appointment of the joint town-clerks of Edinburgh are nearly the same, or in substance the same, as the appointment to which I have referred.

Now, my Lords, it is under this appointment of the town-clerk of Leith that he has made the claim which I have stated; and that claim is, 'to prepare all charters, both original and by progress, all precepts 'of clare constat, and other feudal writings, deeds, and instruments of 'every description, to be granted to or by the Lord Provost, Magis-'trates, and Council of the city of Edinburgh, and their successors in 'office, of properties situated within the town of South Leith, liberties, 'privileges, and pertinents thereof; to receive the fees and profits, and 'prepare the deeds.'

When this case came on before the Lord Ordinary, he did not find the right to the extent that was claimed; on the contrary, he was of opinion that the pursuer, as town-clerk of South Leith, had the sole and undoubted right to prepare and receive the fees, profits, emoluments, and casualties of all renewals of investitures, whether in favour of the heirs or singular successors of property situated within the town of South Leith, and liberties and pertinents thereof, only in any case, where the property was feued out prior to the period when the superiority of South Leith was acquired by the Magistrates of Edin-

burgh. When the case was afterwards brought before the Court of Session, the Court were of opinion that the restriction imposed by the Lord Ordinary was not correct, and that the right of the town-clerk of South Leith was to prepare the deeds, not only of the property that had been feued out before the year 1565, but also of the property that had been feued at any subsequent period, provided it was a part of the property under the superiority which was granted to the city of Edinburgh by the Crown at the period to which I have referred. June 24. 1829.

Now, my Lords, the point that has arisen, by way of appeal, is against that decision of the Court of Session; and the question is, whether that decision can be sustained? I mean, whether that decision can be sustained under the circumstances in which it was pronounced.

It appears in the papers on your Lordships' table,—and it appears, I think, from what fell from the learned Judges themselves,—that the right of preparing these charters is not by law necessarily incident to the office of town-clerk—it is not a necessary part of his duty. It appears, that not unfrequently (and it is natural) the town-clerk is entrusted by the person entitled to the superiority with the discharge of this particular duty; but it does not, from the mere appointment of the person to the office of town-clerk, follow that he has a right to prepare writings of this description. Indeed it was admitted, as stated by one of the learned Judges—the Lord President—that the Magistrates of the city might employ any person they thought proper for that purpose. It seems necessarily to follow, my Lords, that if this is not by law a necessary incident to the office, we must then come to consider it as a question of fact, namely, whether the person holding the office of town-clerk for the time being has had this right conveyed and granted to him, either by the city of Edinburgh, or by the persons holding the superiority for the time being?

Now, my Lords, it was admitted, and that was the foundation of the judgment of the Lord Ordinary, that, with respect to the property which was feued out previously to the granting of the superiority to the city of Edinburgh, the right was in the town-clerk; and I should conceive, that if the evidence was of such a description as to shew that the right was in the town-clerk of Leith, in respect of property feued out down to the period to which I have referred, that would form a prima facie case, which might justify the Court, in the absence of all other evidence, to conclude that the general right belonged to the town-clerk of Leith; but still it was competent, as I apprehend, to the persons contesting this claim, namely, the joint town-clerks of the city of Edinburgh, to say, that this particular privilege had to a certain extent been granted to them. If, for instance, they had produced any authority to them for the performance of those acts, that would have been a sufficient answer to the case set up on the other side; or it was competent to them to rely upon evidence of what had been the usage in this respect before the tribunal which was to decide on the case; and if doubts occurred one way or the other from the effect of

June 24. 1829. that usage, it was for the Court to consider, whether that usage was sufficient to lead them to infer that such an authority had been formerly given.

I apprehend, therefore, my Lords, that in this case the course we ought to pursue would be this:—That it would be proper that your Lordships should remit, for the consideration of the learned Judges of that Court, the question to which I have referred, namely, whether there is evidence to shew that the whole of this right, or any part of this right, was conferred by those who had the power of conferring it, namely the superiors, the Provost, Magistrates, and Council of the city of Edinburgh, on the town-clerks of the city of Edinburgh? whether the Court are satisfied that this authority was conferred on the joint clerks of the city of Edinburgh? or whether the evidence of usage was of such a description as to lead them to the conclusion that such an authority had been formerly granted? I think that it is proper that a minute should be prepared, under these circumstances, for the purpose of the case being submitted to the Court of Session, that they may go into that investigation with a view of ascertaining whether, in point of fact, there is evidence to shew that the Magistrates have done that which in point of law they had a power of doing, namely, conferring this right on the joint town-clerks of the city of Edinburgh. I shall take the liberty of preparing this minute, and submit it to the consideration of the House on a future day.

My Lords, I embrace this opportunity of stating to your Lordships, that your Lordships are in this case put into a situation of considerable difficulty. The appellants appear at your Lordships' bar. They have printed their Case, and they attend here by Counsel, for the purpose of impeaching the judgment of the Court of Session. There are no papers printed in support of that judgment; no Counsel attend for the purpose of stating the grounds on which the judgment was pronounced; and we are driven to the necessity, in this ex parte proceeding, of going over those papers printed by the appellants, and collecting, as well as we can, the facts of the case, and the grounds of the judgment. We are proceeding with some degree of hazard, when under such circumstances we undertake, either in whole or in part, to differ from the Court below. But it is our duty to exercise the best judgment we are able. I have read over these papers, and I have arrived at the result, that this is a question of facts which ought to be submitted to the consideration of the Court below, who should examine the evidence of usage, for the purpose of ascertaining whether that usage has been of such a nature, and carried on and conducted under such circumstances, as to lead fairly to the inference, that the Magistrates of the city of Edinburgh have conferred this privilege on the town-clerks of the city of Edinburgh. If the Court below should be of opinion that there was no sufficient evidence for the purpose of establishing that fact, there is, I think, a prima facie case on the other

side, in support of the claim which has been preferred by the town-clerk of Leith, as modified by the decision of the Court below. June 24. 1829.

Appellants' Authorities.—2. Bank. 3. 70.; 1. Bell on Deeds, p. 383.; 1. Ersk. 1. 30.; 1. Bank. 1. 71.; 1. Ersk. 1. 46.

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ABSOLUTE OR CONDITIONAL.—A party having, by his deed of settlement, conveyed his lands to trustees, to hold them in trust for his widow's liferent during her life and viduity; and, on her death or second marriage, for two substitutes successively, and their heirs and assignees in fee; whom failing, another substitute, but without calling his heirs or assigns; whom failing, other substitutes; and the two first substitutes having predeceased the widow, who never married a second time, and the third substitute having executed a general disposition, and also predeceased the widow;—Held, (affirming the judgment of the Court of Session), 1. That the fee had vested in the third substitute; and, 2. That the general disposition was effectual to evacuate the subsequent destinations.—LEITCH's TRUSTEES v. LEITCH, 17th February 1829, p. 366.

——— OR REVOCABLE.—A father having, by missive letter, sold a piece of land, taking the purchaser bound to grant a bond in favour of himself in liferent, for his liferent use allenarly, and of his sons nominatim in fee; and having caused his sons to sign a postscript to the missive, agreeing to allow the money to lie in the purchaser's hands for eight years certain;—Held, (affirming the judgment of the Court of Session), in a question between the father and the creditors of the sons, That although no bond had been delivered, and no disposition prepared, the fee had irrevocably vested in the sons.—SPENCE v. ROSS, 25th March 1829, p. 380.

ACQUIESCENCE.—Circumstances held not to constitute an acquiescence barring an heir of entail from challenging a lease in a question with an onerous assignee.—STIRLING v. DUN, 22d June 1829, p. 462.

APPEAL.—1. An appeal sustained in name of an unincorporated Commercial Banking Company, and several of the individual partners, against a judgment of the Court of Session, in a process in which they were defenders.—COMMERCIAL BANKING COMPANY v. POLLOCK's TRUSTEES, 28th July 1828, p. 365.

———2. It would seem that an appeal against an interlocutory judgment, taken after the final decision of a cause, although the decree exhausting the cause is not appealed against, is competent.—DOWNE, &c. v. PITCAIRN, &c. 24th June 1829, p. 472.

———3. An Appendix not laid on the table of the House, cannot be alluded to from the Bar; but the House may order it to be laid on the table, and then Counsel may remark on it.—JOLLY v. M'GREGOR, 20th June 1828, p. 142. foot note.

APPROBATE AND REPROBATE.—See *Foreign*.

ASSIGNATION.—Circumstances under which it was held, ex parte, (reversing the judgment of the Court of Session), that an assignation of a building lease by a father to his sons was not collusive, and

therefore sustained in a question with a creditor of the father.—MALCOLMS v. YOUNG, 5th June 1829, p. 404.

ASSIGNATION IN SECURITY.—A mercantile company, in possession of a lease of a printfield, having borrowed money from a private Bank, and granted an assignation of the lease in security to the Bank, which was intimated to the landlord; and the Bank having thereupon granted a sub-lease to the company, who remained in possession, and paid the rents; and no possession having been taken by the Bank; and the Court of Session having held, in a question with the trustee on the sequestrated estate of the company, that the assignation was not effectual against the creditors;—a remit made to take the opinions of all the Judges.—CABBELL v. BROCK, 16th May 1828, p. 75.

BANKRUPT.—Held, (affirming the judgment of the Court of Session), That a general adjudication under the Bankrupt Statute, of the estates of an heir in favour of the trustee on his sequestrated estate, within three years from the death of the ancestor, constitutes complete diligence in favour of the creditors of the ancestor, so as to give them a preference over his estates, without the necessity of leading separate adjudications.—BENNET v. M'LACHLAN, 15th June 1829, p. 449.

BILL OF EXCHANGE.—The Court of Session having found, that a reference to the oath of the drawer of a bill was incompetent, in respect that he had been convicted of a crime inferring infamia juris;—the House of Lords found it unnecessary to pronounce any judgment on that question, but that under the circumstances the reference had been properly rejected.—RITCHIE v. MACKAY, 24th June 1829, p. 484.

BONA FIDES.—The House of Lords having, on the 31st of July 1822, found, (reversing a judgment of the Court of Session), that sales made judicially upwards of thirty years previously, under a private statute, of parts of an entailed estate, were null, in respect of certain minor heirs of entail not having been properly brought before the Court; and that one of those heirs, who succeeded to the estate, was entitled to have the lands so sold restored to him; and the Court of Session having found the purchasers were bona fide possessors till the 31st July 1822, and not bound to account for the rents till Martinmas thereafter, and found neither party entitled to expenses;—the House of Lords reversed the judgment to the effect of finding the purchasers accountable for the rents due at Martinmas, without prejudice to any claim they might have for the crops of lands in their own possession reaped prior to that term; and quoad ultra affirmed the judgment.—AGNEW'S EXECUTRIX v. STAIR, &c. 22d July 1828, p. 286.

CAUTIONER.—1. A curator bonis having been appointed to two uncognosced lunatics, and found caution for performance of his duties; and having, by authority of the Court of Session, (given in an action of cognition and sale at his instance alone), sold the heritage in which the lunatics were fiars; and having become bankrupt, indebted to them in a large balance;—Held, (affirming the judgment of the Court of Session), That the cautioners were responsible for the balance, although it was alleged that, as curator bonis, he had no title to insist in a cognition and sale, nor the Court any authority to empower him to sell.—EATON, &c. v. MURDOCH, 4th July 1828, p. 246.

CAUTIONER.—2. Where parties bound themselves to guarantee S. F. and Co. in reimbursement of all bills drawn by A. on, and accepted by them, for four years, and to see S. F. and Co. provided with funds to relieve these acceptances, before the acceptances fell due; and S. F. and Co. opened an account with A., debiting him with these acceptances, and crediting him with bills remitted by him; and at the end of the first year, S. F. and Co. desired him to draw in future on a Banking house, (of which the partners of S. F. and Co. were, with others, members), and the bills were accepted by the Bank; but no notice of this was given to the sureties; and before the lapse of the four years A. became bankrupt, indebted in a balance to S. F. and Co.;—Held, 1. (affirming the judgment of the Court of Session), That the sureties were not liable for the bills drawn on, and accepted by the Bank; and were therefore liberated from their obligation at the end of the first year; and, 2. (reversing the judgment), That although there was at the end of the first year a large balance on the account-current against A. yet as, by subsequent remittances made by him, it was extinguished, and the ultimate balance arose out of posterior transactions, the sureties were not liable for that ultimate balance.—SPEARS v. HOUSTONS, &c. 22d May 1829, p. 392.

COMPENSATION.—A plea of compensation, founded on an alleged disputed claim, repelled, (affirming the judgment of the Court of Session).—DOWNE, &c. v. PITCAIRN, &c. 24th June 1829, p. 472.

CONDITIONAL OR ABSOLUTE.—See *Absolute or Conditional.*

CORPORATION.—An incorporation having by its by-laws fixed certain rates of annuity payable to different classes of decayed members and widows;—Found, (affirming the judgment of the Court of Session), That a widow was entitled to enforce, in a court of law, her claim as a matter of right, and was not bound to accept the allowance as a payment depending on the pleasure of the incorporation.—FLESHERS OF GLASGOW v. SCOTLAND, 20th June 1828, p. 209.

CURATOR.—See *Cautioner*, 1.

DISCHARGE.—Held, (affirming the judgment of the Court of Session), 1. That a discharge of an heritable bond by tutors, after the expiration of the tutory, is not valid; and, 2. That the tutors granting such a discharge, are liable to repay the amount of the bond to the party to whom they had granted the discharge, and against whom the bond has been revived.—ROSS, &c. v. LOCKHARTS, &c. 24th June 1829, p. 481.

ENTAIL.—1. Part of an entailed estate, which was greatly more than sufficient, having been sold under the 42. Geo. III. c. 116. for redemption of the land-tax; and no evidence having been taken that it could not have been divided, so that an adequate part only might have been sold; or that the sale of the whole would have been more eligible and advantageous for the estate and heirs-substitutes than the sale of a part only;—Held, in an action at the instance of an heir-substitute, (affirming the judgment of the Court of Session, but superseding their findings),—1. That the sale was not effectual; and, 2. That a singular successor infeft, and whose author was also infeft, could not be affected by the fraud of his author.—WILSON, &c. v. ELIOTT, 2d May 1828, p. 60.

———2. Held, (affirming the judgment of the Court of Session), 1. That the omission of the words ' for new infeftment' in an entail

made in form of a bond and procuratory of resignation, is not fatal to it, the deed being otherwise sufficiently expressed: 2. That a declaration, that in case an heir-substitute succeed to another estate requiring the assumption of a name and title inconsistent with those provided by the entail, he shall execute a conveyance of the entailed property to the next heir subject to the fetters, does not free an heir not taking under such conveyance,—the fetters being held, on a sound construction of the whole clause, to apply to the heirs universally; and, 3. That a declaration that debts and deeds shall be null and void, so far as they affect the estate, is sufficient, without declaring that they shall be null and void as against the contravener.—MUNRO v. MUNRO, 25th July 1828, p. 844.

ENTAIL continued.—3. Held, (reversing the judgment of the Court of Session), 1. That the word 'dispone' in an entail strikes at leases of extraordinary endurance. 2. That the lease of a loch for 300 years is in no more favourable situation—in a question whether such lease falls under the prohibition to dispone—than any other part of the entailed estate. 3. (affirming the judgment), That a pro indiviso share of a loch, forming part of an entailed estate, is subject to the fetters of the entail. 4. Circumstances held not to constitute an acquiescence barring the heir of entail from challenging the lease in a question with an onerous assignee.—STIRLING v. DUN, 22d June 1829, p. 462.

——See *Title to Pursue*, 2.

EXCLUSIVE PRIVILEGE.—See *Public Officer*.

EXPENSES.—Circumstances in which, although pursuers were partially successful, yet as the defenders succeeded in regard to disputed counter-claims, the defenders were entitled to their expenses.—STRACHAN and GAVIN v. PATON, &c. 22d February 1828, p. 19.

FEE.—See *Absolute or Revocable*.

FOREIGN.—A native of Scotland domiciled in India, but who possessed heritable bonds in Scotland, as well as personal property there and in India, having executed a will in India, ineffectual to carry Scotch heritage; and a question having arisen, whether his heir-at-law (who claimed the heritable bonds as heir) was also entitled to a share of the moveables, as legatee under the will;—Held, (affirming the judgment of the Court below), that the construction of the will, as to whether it expressed an intention to pass the Scotch heritable bonds, and the legal consequence of that construction, must be determined by the law of England.—TROTTERS v. TROTTER, 10th June 1829, p. 407.

——See *Insurance*.

FRAUD.—A daughter and her husband having obtained from her father, who was eighty-three years old, facile, and addicted to habits of intoxication, a deed in the shape of an agreement and obligation between them and him, by which he conveyed to them, without any onerous consideration, funds of the value of about L.4000, reserving an annuity of L.40 out of these funds; and which deed was prepared by their agents without the intervention of any man of business on his part, and under the erroneous impression that unless he executed it he might be reduced to poverty;—Held, (affirming the judgment of the Court of Session), That the deed was not binding on him. M'DIARMID v. M'DIARMIDS, 28th March 1828, p. 37.

HOMOLOGATION.—One of the next of kin of a defunct having been named a trustee in a trust-deed by the defunct, and having ac-

cepted, and taken benefit under the deed;—Held not barred from claiming the residue as belonging to him and the other next of kin.—CRICHTON v. GRIERSON, &c. 25th July 1828, p. 329.

HOMOLOGATION.—See *Entail*, 3.

HUSBAND AND WIFE.—A party having raised a declarator of marriage and adherence against a woman, whom he alleged was his wife, stating in the summons an irregular marriage followed by consummation at Holytown, and the celebration of that marriage by a subsequent regular marriage in facie ecclesiæ in Edinburgh; and the wife having denied marriage and consummation at Holytown, and averred that she had not consented ad ipsum matrimonium in Edinburgh, but had been conquassed by threats to submit to the ceremony there; and having immediately thereafter entered into a marriage with another party, enjoyed the status of marriage, and had a family; and the alleged first husband being perfectly aware of that status, and having expressly recognized her and husband in their character of husband and wife;—

(1.) Found, (reversing the judgment of the Court of Session), That there was no proof whatever of the Holytown marriage, nor of any regular marriage in facie ecclesiæ in Edinburgh; and further, taking into consideration all the facts and circumstances proved in relation to the conduct of the parties before and after the alleged Edinburgh marriage, that there was not evidence sufficient to justify the conclusion that the parties did, on the day when the Edinburgh marriage was said to have been celebrated, or at any other time, voluntarily and deliberately express that real mutual consent immediately to contract marriage, which, by the law of Scotland, is necessary to give validity to such an irregular marriage as was said to have taken place.

(2.) Question raised, but not decided, Whether, in a case where the alleged first husband had been aware of the second marriage in the manner proved, a court of justice, even if they felt themselves bound to decern in the declarator of marriage, would decern in the conclusion of adherence, and the restitution of conjugal rights, either in relation to cohabitation or patrimonial interests?—JOLLY v. M'GREGOR, 20th June 1828, p. 85.

IDIOTRY AND FURIOSITY.—The Court of Session having appointed a curator bonis to a party alleged to be fatuous; and, on an application by him and his interdictors, (one of whom acted as his law-agent), having refused to recall the appointment, and repelled an objection that his fatuity could be ascertained only by the verdict of a jury; and having found both his interdictors and agent liable in expenses to the curator;—The House of Lords, after a remit to the Court of Session for the opinions of all the Judges, affirmed the judgment without costs.—BRYCE, &c. v. GRAHAME, 23d July 1828, p. 323.

IMPLIED OBLIGATION.—See *Mutual Contract*, 2.

INCORPORATION.—See *Corporation*.

INDEFINITE PAYMENT.—See *Cautioner*, 2.

INSURANCE.—An English Insurance Company having, through their agent in Glasgow, agreed to insure a steam-vessel at sea against fire;—Held, 1. (contrary to the judgment of the Court of Session), That such an insurance fell under the statute 6. Geo. I. c. 18.; but, 2. That it was a Scotch contract, and that the statute did not

apply to Scotland quoad hoc.—ALBION COMPANY v. MILLS, 27th June 1828, p. 218.

JURISDICTION.—Held, (affirming the judgment of the Court of Session),—1. That the Court of Session have jurisdiction to review, and set aside the proceedings of a presbytery, under the 43. Geo. II. c. 54. where these proceedings have been irregular and informal: 2. That the omission to take in writing the evidence led before the Presbytery, is an informality inconsistent with the enactment of the statute, and open to correction by the Court of Session.—CAMPBELL v. BROWN, 12th June 1829, p. 441.

KING.—See *Literary Property.*

KING'S PRINTER.—See *Literary Property.*

LAND-TAX.—See *Entail.*

LANDLORD AND TENANT.—1. A landlord having drawn up certain 'articles and conditions' for letting his estate, by which, inter alia, it was stipulated, that 'the whole fodder is to be used upon the ground, 'and none sold or carried away at any time, hay only excepted, 'and all the dung to be laid on the farm the last year of the lease;' and a tenant having taken a farm by a missive, binding himself to the conditions in another tenant's missive, which referred to these articles; and having also signed a draft of a tack referring to them—but the draft never having been extended, and he not having signed the articles themselves, but having possessed for the full endurance of the lease;—Held, 1. (affirming the judgment of the Court of Session), That the tenant was bound by the 'articles and condi-'tions;' but, 2. (reversing the judgment), That, in conformity to the reversal in the case of Gordon against Robertson and others, 10th May 1826, he was not entitled to carry away the fodder of the last year.—GORDON v. ANDERSON, 15th February 1828, p. 1.

———2. Circumstances under which it was held, ex parte, (reversing the judgment of the Court of Session), that an assignation of a building lease by a father to his sons was not collusive, and therefore sustained in a question with a creditor of the father.—MALCOLMS v. YOUNG, 5th June 1829, p. 404.

———3. A way-going tenant, whose ish was from the houses and grass at Whitsunday, and from the arable land at the separation of the crop from the ground; and who was bound to consume on the farm the whole fodder, except hay and the fodder of the last crop; and undertook sufficiently to cultivate, labour, and manure the land,—found entitled (affirming the judgment of the Court of Session) to the value of the straw remaining on the farm at the way-going Whitsunday, (not amounting to more than necessary for the purposes of the farm until the possession expired), and to the dung made since last wheat seed time; it having been the tenant's unchallenged practice, and agreeable to the received rules of good husbandry in the district, to preserve the manure for the wheat crop.—ALLEN v. BERRY, 10th June 1829, p. 417.

LEASE.—See *Landlord and Tenant.*

LITERARY PROPERTY.—Held, 1. (affirming the judgment of the Court of Session), That the right of printing Bibles, and certain other books, (enumerated in the patent granted by the Crown to the King's printers in Scotland), and of prohibiting their importation, belongs exclusively to the King, as part of the royal prerogative in Scotland, and, by virtue of his patent, to the printers appointed by him: And, 2. (reversing the judgment), That the privi-

lege and prohibition extended to the 'Book of Common Prayer,' as well as to the other books mentioned in the patent.—MANNERS and MILLER v. KING'S PRINTERS, 21st July 1828, p. 268.

LOCUS PŒNITENTIÆ.—A father having, by missive letter, sold a piece of land, taking the purchaser bound to grant a bond in favour of himself in liferent, for his liferent use allenarly, and of his sons nominatim in fee; and having caused his sons to sign a postscript to the missive, agreeing to allow the money to lie in the purchaser's hands for eight years certain;—Held, (affirming the judgment of the Court of Session), in a question between the father and the creditors of the sons, that although no bond had been delivered, and no disposition prepared, the fee had irrevocably vested in the sons.—SPENCE v. Ross, 25th March 1829, p. 380.

MANDATE.—Held, (affirming the judgment of the Court of Session), That a mandatary or factor of a person abroad is entitled to act in that character, until he receive authentic intelligence of the death of his constituent.—CAMPBELL v. ANDERSON, 1st May 1829, p. 384.

MARRIAGE.—See *Husband and Wife.*

MASTER AND SERVANT.—See *Mutual Contract*, 3.

MUTUAL CONTRACT.—1. Ship-builders having agreed to repair and lengthen a whale ship at a certain rate of wages, and to make use of English oak; and, during the currency of the operations, the rate of wages of carpenters having, under the authority of the Justices of the Peace, been increased; and the ship-builders having made use of American instead of English oak; and the ship having been delivered as complete, and thereupon sent to the whale fishing at Davis' Straits, but, in consequence of the deficiency of the work, having been obliged to return to port, and been there detained for twenty-two days undergoing repairs; and having then lost the proper season for the Straits, and been sent to Greenland;—Held, (affirming the judgment of the Court of Session), 1. That the ship-builders could not charge a higher rate of wages than that agreed on; 2. That although American oak, at the time, was as expensive as English, and was then considered equally good, yet, as it was not so good, the ship-builders were responsible for the loss thereby sustained; 3. That they were liable for the expense of the repairs, and of the wages, &c. of the seamen, incurred after the vessel was brought back from the voyage to Davis' Straits; 4. That they were also liable for any loss suffered by the vessel not being able to go to Davis' Straits, or to reach Greenland at the proper fishing season; and, 5. That although the ship-builders were partly successful in the litigation, yet as the ship-owners prevailed in regard to their counter-claims, they were entitled to expenses.—STRACHAN and GAVIN v. PATON, &c. 22d February 1828, p. 19.

——— 2. Held, (affirming the judgment of the Court of Session), That a road-contractor is liable for the wages of workmen hired by a person acting ostensibly as his overseer, but who, it was alleged, was a sub-contractor,—there being no satisfactory evidence that he was known in this character to the workmen.—M'PHAIL v. GLENNIE, 11th May 1829, p. 389.

——— 3. Where it was stipulated in the contract of a Banking Company, that the manager should be removable by two-thirds of the joint committee of management;—Held, 1. (affirming the judgment of the Court of Session), That the Company were

entitled, by a resolution of two-thirds of the committee, to remove a manager who was named and appointed in the contract; and, 2. (reversing the judgment), That the Company were not bound to shew proper cause for having done so, or liable in damages if they could not do so.—COMMERCIAL BANK *v.* POLLOCK'S TRUSTEES, 12th June 1829, p. 430.

OATH.—See *Bill of Exchange.*

PARTNERSHIP.—See *Title to Pursue*, 3. and 4.

PRESBYTERY.—See *Jurisdiction.*

PRESCRIPTION.—See *Road.*

PRESUMPTION.—See *Road.*

PROCESS.—Argued, but not determined, Whether the several interlocutors pronounced in the Courts below in a declarator of marriage, or where a second marriage had taken place apparently regularly and a family born, could have been deemed duly pronounced in proceedings to which the second husband and the children of the second marriage were not parties?—JOLLY *v.* M'GREGOR, 20th June 1828, p. 85.*

————See *Appeal—Title to Pursue.*

PROOF.—See *Husband and Wife.*

PROPERTY.—See *River.*

PUBLIC OFFICER.—Held, (ex parte, reversing the judgment of the Court of Session), That the right to receive the fees and emoluments of preparing charters, precepts of clare constat, and other feudal writs granted to or by the Magistrates of Edinburgh, relative to subjects situated within the burgh of barony of South Leith, and of which the superiority had been acquired by the Magistrates posterior to 1565, is not necessarily incident to the office of clerk of South Leith; but although he had shewn a prima facie case of the right to draw them, yet it was competent for the town-clerks of Edinburgh to prove either a direct authority given by the superiors to them to draw them, or such usage as necessarily inferred such authority.—CUNNINGHAM and BELL *v.* VEITCH, 24th June 1829, p. 491.

REFERENCE TO OATH.—The Court of Session having found, that a reference to the oath of the drawer of a bill was incompetent, in respect that he had been convicted of a crime inferring infamia juris;—the House of Lords found it unnecessary to pronounce any judgment on that question, but that under the circumstances the reference had been properly rejected.—RITCHIE *v.* MACKAY, 24th June 1829, p. 484.

REPARATION.—See *Mutual Contract*, 1. and 3.

RES NOVITER.—Circumstances under which a proof of facts alleged to be res noviter refused.—CAMPBELL *v.* ANDERSON, 1st May 1829, p. 384.

RIVER.—Held, (varying the judgment of the Court of Session), That an heritor was not entitled to erect a bulwark, or any other opus manufactum, on the banks of the river Tay, which might have the effect of diverting the stream of the river, in times of flood, from its accustomed course, and throwing the same upon the lands of an opposite proprietor, although it was alleged that the bulwark was intended to protect the heritor's lands from the flood.—MENZIES *v.* BREADALBANE, 4th July 1828, p. 235.

* See also the cases in the foot note to p. 202.

ROAD.—The uninterrupted use and enjoyment of a foot-path by adjacent feuars, &c. as far back as the memory of man could extend, through the property of a party infeft under titles which did not mention any such path prior to 1789, having been proved; and the proprietor having proved a series of interruptions from and after 1789, but which were resisted, and the use of the foot-path continued; and the Judge having directed the jury, 1. That, from the evidence of uninterrupted possession prior to 1789, they were entitled in law to presume forty years' possession; and, 2. That the interruptions by the proprietor were not sufficient to defeat the right acquired by such possession;—Held, (affirming the judgment of the Court of Session), That the direction was correct.—HARVIE v. RODGERS, &c. 8th July 1828, p. 251.

SALE.—See *Entail*, 1.

SALMON FISHING.—Found, (affirming the judgment of the Court of Session), 1. That stake-nets erected on the proper shore of the sea, are not illegal; and, 2. That proprietors of salmon fishings in an adjacent river, have no title to object to heritors on the sea-coast, who hold a right of fishing by net and coble from the Crown, exercising their right by stake-nets.—KINTORE v. FORBES, &c. 11th July 1828, p. 261.

STATUTE 1661, c. 21.—See *Bankrupt*.

——— 6. Geo. I. c. 18.—See *Insurance*.

——— 43. Geo. II. c. 54.—See *Jurisdiction*.

SUCCESSION.—See *Trust*.

TACK.—See *Landlord and Tenant*.

TAILZIE.—See *Entail*.

TESTAMENT.—Held, (affirming the judgment of the Court of Session), in a question with the next of kin, that a mortis causa conveyance to trustees was valid, whereby a testator declared, 'That 'it is my wish that such remaining means and estate shall be ap- 'plied in such charitable purposes, and in bequests to such of my 'friends and relations, as may be pointed out by my said dearly 'beloved wife, with the approbation of the majority of my said 'trustees.'—CRICHTON v. GRIERSON, &c. 25th July 1829, p. 329.

——————See *Foreign—Trust*.

TITLE TO PURSUE.—1. A mercantile company, in possession of a lease of a printfield, having borrowed money from a private Bank, and granted an assignation of the lease in security to the Bank, which was intimated to the landlord; and the Bank having thereupon granted a sub-lease to the company, who remained in possession, and paid the rents; and no possession having been taken by the Bank; and the Court of Session having held, in a question with the trustee on the sequestrated estate of the company, that the assignation was not effectual against the creditors; and the Bank having appealed in name of the office-bearers;—Question raised, but not decided, 1. Whether they had any title to appear; and, 2. A remit made to take the opinions of all the Judges on the merits.—CABBELL v. BROCK, 13th May 1828, p. 75.

——————2. Held, (affirming the judgment of the Court of Session), 1. That a party pursuing, as heir of entail in possession, a reduction of a sale of part of an entailed estate, sold under a private Act of Parliament and relative decree of the Court of Session, had no title to pursue, in consequence of having made up his titles to, and possessed the entailed estate in contravention of the

original entail on which he founded his action; and, 2. That the principal pursuer having concluded that the defender should deliver up the lands to the pursuer, as heir of entail in possession, the substitute heirs of entail, who insisted with him in the same summons, were also barred.—M'Culloch, &c. *v.* M'Kenzie, 18th July 1828, p. 352.

Title to Pursue continued.—3. An appeal sustained in name of an unincorporated Commercial Banking Company, and several of the individual partners, against a judgment of the Court of Session, in a process in which they were defenders.—Commercial Banking Company *v.* Pollock's Trustees, 28th July 1828, p. 365.

———4. Circumstances under which the title of the office-bearers of an unincorporated association to pursue, was sustained.—Downe, &c. *v.* Pitcairn, &c. 24th June 1829, p. 472.

———See *Salmon Fishing.*

Town-Clerk.—See *Public Officer.*

Trust.—A party having conveyed his estate to trustees, for behoof of a contingent heir, whom failing, other substitutes, with a general assignation of rents for behoof of the contingent heir;—Held, (affirming the judgment of the Court of Session), That the heir-at-law had no claim to the rents arising between the death of the party and the succession of the heir.—Graham *v.* Templer, 1st April 1828, p. 47.

———See *Testament—Absolute or Conditional.*

Tutor and Curator.—Held, (affirming the judgment of the Court of Session), 1. That a discharge of an heritable bond by tutors, after the expiration of the tutory, is not valid; and, 2. That the tutors granting such a discharge, are liable to repay the amount of the bond to the party to whom they had granted the discharge, and against whom the bond has been revived.—Ross, &c. *v.* Lockharts, &c. 24th June 1829, p. 481.

———See *Cautioner.*

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